Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

-against-

ELLIOTT H. VELGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

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Introductory Statement

This is a petition for certiorari to the United States Court of Appeals for the Second Circuit for review of a judgment filed September 9, 1975, which reversed an order and judgment of the United States District Court for the Southern District of New York. The District Court had dismissed the complaint and granted judgment to the defendants (here the petitioners) on all issues.

Citations Below

Neither the opinion of the Court of Appeals nor that of the District Court are reported as yet. Both are appended hereto.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed was filed September 9, 1975. Certiorari jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

In this proceeding brought pursuant to 42 U.S.C. §1983, the plaintiff, a former New York City probationary police officer, whose employment was terminated without his having been afforded a hearing as to the reasons for his termination, seeks, inter alia, reinstatement and damages for alleged injury to his reputation. A trial was held on the question whether the Police Department had stigmatized him so as to foreclose him from other job opportunities. There was testimony that, inter alia, he had been terminated from a job as a Penn Central security officer after a Penn Central captain, with the plantiff's express written authorization, saw his personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt.

The Court of Appeals, rejecting

the findings of the trial court, concluded that the plaintiff had met his burden of showing stigma. It found that governmental and private police agencies have access to the Police Department's personnel files and that the serious derogatory material in the plaintiff's file, which reflected on his mental condition, had foreclosed him from employment in both the public and private sectors. The Court concluded that unconstitutionality is not avoided by a Departmental requirement that the Department obtain written authorization from the former employee before it releases any material in his personnel file. Thus, the impact of the Court's decision is to bar the Department from informing another police agency of material which may be highly relevant to the sensitive tasks of an armed peace officer if, prior to his termination from probationary employment with the

Department, it has not given him notice of charges and a hearing, even though the former probationer himself has authorized the release of his files.

There are two questions presented. The first is whether a public employer - in particular, a police agency - is constitutionally required to afford probationary employees a hearing prior to termination where there is derogatory and possibly stigmatizing material in his personnel file or else be foreclosed from releasing any material in that file to a prospective employer even where the former employee expressly authorizes release of such material to that employer.

The second question is, assuming a hearing is required, must there be a hearing on stated charges in order to effect termination or is the required hearing limited to affording the probationer the opportunity to clear his name of any stigmatizing charges.

Statement of the Case

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. The plaintiff, Elliott H. Velger, was appointed as a New York City probationary patrolman on August 15, 1972 (21a).* The Police Commissioner, having found his performance unsatisfactory, ordered his services terminated effective February 16, 1973 (10a). In accordance with standard procedures as to probationary employees, plaintiff did not receive a hearing prior to dismissal nor was he apprised of the reasons for his termination (6a).

On May 25, 1973, plaintiff commenced this action in the United States District Court for the Southern District of New York to have his dismissal vacated and annulled, to enjoin the defendants

* Numbers in parentheses followed by "a" refer to pages of the appendix in the Court of Appeals.

from refusing to employ him and for damages caused by injury to his reputation (8a-9a). Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (12a-13a). In July, plaintiff moved for an order convening a three-judge court to declare section 63 of the New York State Civil Service Law, which mandates probationary periods for employees, unconstitutional (14a).

Judge GURFEIN denied the motion to convene a three-judge court on the grounds that substantial questions of constitutionality were not included in the complaint and because the Second Circuit, in Russell v. Hodges, 470 F. 2d 212, 218 n. 6 (1972), had already decided that plaintiff's contention was "frivolous" (31a). He determined that plaintiff,

as a probationary employee, had no property interest in not being terminated such as would require a hearing. However, he permitted the filing of further affidavits and the amendment of the complaint to incorporate the plaintiff's new charge that he had been denied employment opportunities because of derogatory material in his personnel file which he had never seen or been allowed to refute (35a-36a, 45a).

On November 25, 1974, a hearing was held before Judge WERKER on the issue of whether the plaintiff had been stigmatized and foreclosed from employment opportunities because of the personnel file compiled by the Police Department. The hearing disclosed that the plantiff had been terminated from a job as a Penn Central security officer

after a Penn Central captain, with the plaintiff's authorization, saw his New York City Police Department personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt (111a,113a,115a-119a). There was also testimony as to the general policies and practices of the Department (130a, 133a-141a), and as to the plaintiff's efforts to find other employment (93a-99a).

The plaintiff has never denied that he put a gun to his head. All that he claimed in his brief to the court below (p.16) was that he should have been permitted to "explain" the "alleged incident": "It might all have been a mistake. It could also have been a little horseplay."

The District Court concluded that the plaintiff (A 21)*:

* Numbers in parentheses preceded by "A" refer to pages of the appendix annexed hereto.

> "has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof."

The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the plaintiff had not proved stigma and found that "the manner in which personnel records are made available to inquiring public and private employers insures that serious derogatory information in the file will stigmatize the dischargee" (A11-A12). The Court refused to attach any significance to the Department's requirement that Penn Central, a private employer, present written authorization from the plaintiff before it would

release his personnel files on the ground that, if authorization were refused, the applicant would be denied employment (A 10).*

REASONS FOR GRANTING THE WRIT

(1)

In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court set forth the guidelines for determining when a public employee is entitled to a trial-type hearing prior to termination of his employment. It held that procedural due process applies only when the interest in continued employment is within the Fourteenth Amendment's pro-

* We annexed to our brief in the Court of Appeals a directive from Police Commissioner Michael J. Codd, dated April 2, 1975, which states that: "In any case where a probationary employee of this Department is terminated, access to his personnel file by any prospective employer, private or governmental, will be granted only upon the probationary employee executing a written authorization for such prospective employer to inspect his file."

tection of liberty and property. The question before the Court below was whether the actions of the Police Department were violative of the plaintiff's right to liberty.* We submit that the conclusion that they were represents an unwarranted extension of the procedural due process rights of public employees as laid down in Roth and a departure from the balance carefully drawn in Roth between the rights of public employees and those of their employers.

In the case at bar, no reason was given for the plaintiff's termination and there was no effort on the part of the Police Department to blacklist him or to

* Judge GURFEIN rejected the claim of the plaintiff herein that he had a property interest in his probationary position (34a). The Court of Appeals stated (A 7): "We find it unnecessary to decide whether Velger had a property right in his position and we do not reach that point."

publicize or circulate derogatory information about him. Cf. Roth, supra, at pp. 573-574. Nonetheless, under the ruling of the Court below, even where a former probationary employee executes a written release authorizing a prospective employer to see his personnel file, the Police Department must not allow the file to be released if the former probationary employee had not been given a hearing on stated charges prior to his termination. New York State law does not require such a hearing for termination of probationary employees and Roth makes clear that under the Constitution a public employer ordinarily has the right to terminate without a hearing employees who do not have State law tenure rights or contract rights in continued employment. However, the practical result of the decision here sought to be reviewed is to require either that all public employees (probationers, provisionals, and those exempt from the civil

service rules, as well as tenured civil servants) be afforded a hearing on stated charges prior to termination, thereby eliminating the distinction drawn in Roth, or to preclude public employers from disclosing information about former non-tenured employees even where the former employees desire and authorize such disclosure.

The Untoward Consequences of the Decision Below

By way of illustration, we ask the Court to consider the situation of a Justice of this Court, with a confidential clerk who has no property interest in his job and who proves unsatisfactory because, for example, he has disclosed the Court's decision on a still pending case. The Justice decides to fire the clerk. He must then decide whether to hold a full-scale hearing on stated charges, for, if he does not, should his former clerk apply for a position with another judge, he will be barred from revealing

anything whatever about the former clerk's behavior. This would be so even if the fact of the disclosure was undisputed. We submit that Roth does not require such a result and should not be so extended.

Moreover, we submit the decision below is especially unfortunate in its application to a police agency. To require the New York City Police Department to withhold information about a former employee from other police agenices who are considering hiring him, arming him and assigning him to the sensitive tasks of a police officer, where that former employee has himself authorized disclosure, imposes an undue restriction on the Department in the fulfillment of its obligations to the public. Here the former employee does not deny that while a trainee he put a gun to his head; and there can be no doubt that such

an act is a constitutional basis for termination of his probationary employment. The Department should not be barred from disclosing its files to other police agencies with the former employee's permission.

The rule which we urge here is not inconsistent with this Court's decision in Roth. It does not allow unfettered freedom to publish derogatory information about former employees - in the case of excessive publication of such information or publication for malicious reasons, the former employee would have available to him his common law remedies for defamation and his rights under the civil rights laws.

Rather, under the rule which we urge all that would be allowed would be very limited disclosure pursuant to express authorization by the former employee. On balance, we submit, this adequately protects the interests sought to be protected by Roth and at the same time protects the interests of public employees and society in general.

(2)

In Roth this Court, in discussing the kind of hearing to be afforded a public employee whose rights to liberty are implicated by his discharge, stated (408 U.S. at 573, n. 12):

> "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons."

The Court below held that the Police Department must either provide for confidentiality or else "rudimentary procedural due process requires that such notice of charges and a hearing be afforded before a dismissal can be effective" (A 14). Thus, the Court appears to have neglected the distinction drawn in Roth between the kind of hearing to be afforded an employee with a property interest in his employment, who cannot be terminated unless stated charges are proved at a hearing, and the kind of hearing to be afforded a probationary employee whose termination may involve a stigma and whose hearing is for purposes of clearing his name. For this reason as well, a writ of certiorari should be granted.

The questions of when a hearing must be afforded to a public employee, and of the nature of such a hearing, are questions which affect the administration of governmental agencies throughout not only the City of New York but the entire country. We submit that the decision of the Court below represents an unwarranted departure from this Court's comprehensive ruling in Board of Regents v. Roth, and, because of the importance of such a departure, is a decision which warrants review by this Court.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

December 1, 1975.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

L. KEVIN SHERIDAN.
NINA G. GOLDSTEIN,

of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 912 - September Term, 1974.

(Argued May 28, 1975 Decided
September 9, 1975.)

Docket No. 75-7042

ELLIOTT H. VELGER,

Plaintiff-Appellant,

against

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants-Appellees.

B e f o r e :

CLARK, Associate Justice,*
HAYS and MANSFIELD, Circuit Judges.

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*Associate Justice; United States Supreme Court (Ret.) sitting by designation.

Appeal from an order and judgment entered in the United States District Court for the Southern District of New York, Henry F. Werker, Judge, which dismissed the complaint brought pursuant to 42 U.S.C. §1983 and granted judgment for the defendants on all issues.

Reversed.

SAM RESNICOFF, Esq., New York, New York, for Appellant.

W. BERNARD RICHLAND, Corporation Counsel, City of New York, New York, for Appellees.

CLARK, Associate Justice:

In this appeal of his case brought under 42 U.S.C. §1983,[1] Elliott H.

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1 Title 42 of the United States Code, Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

Velger, appellant, seeks reversal of a judgment refusing: 1) his reinstatement as a probationary patrolman with the New York City Police Department; and 2) the recovery of damages for injury to his reputation because of his summary dismissal. On February 16, 1973, he was dismissed without cause, without a hearing, and without being apprised of the grounds therefor.[2] Velger had enlisted

2 The suit was filed on May 25, 1973, against Donald F. Cawley, Police Commissioner, Patrick Murphy, former Police Commissioner, Harry I. Bronstein, Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham Beame, as Comptroller, City of New York,

in the force as Patrolman, Police Trainee, on January 30, 1970. He served in that position until August 15, 1972, shortly after his twenty-first birthday, when he was elevated to the position of probationary Patrolman. He remained in this position until his abrupt dismissal. He had served three years and had only five more months to serve on his probationary period.

While prosecuting his suit, Velger sought other employment. On September 10, 1973, he was provisionally

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and the City of New York. The appellant originally sought a mandamus requiring the defendants to reinstate him and an order empanelling a three-judge court to test the constitutionality of Section 63 of the New York Civil Service Law. Section 63 mandates probationary periods for New York civil servants and was the authority for the regular one year probationary Velger was serving when he was dismissed.

The district court held the claim as well as the request for a three-judge court to be "frivolous" under this Court's ruling in Rusell v. Hodges, 470 F.2d 212 (2d Cir. 1972). See Velger v. Cawley, 366 F. Supp. 874 (S.D.N.Y. 1973).

employed by the Penn Central Railroad as a patrolman-watchman. He had placed fourth out of twenty applicants in competitive testing for the position. But after some sixty days with the Penn Central, he was discharged solely because of the results of an inspection of his personnel record in the New York City Police Department. He had granted Penn Central authorization to see his records on file at the Department. The trial judge found that Penn Central "gleaned" from Velger's personnel file that he had [sic] "had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt."[3]

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3 Velger was not made aware of the accusation. In his brief, he says:

> Since the alleged incident occurred at the Police Academy and 'four or five individuals' were involved appellant should have been given an opportunity to explain. It might all have been a little horseplay...

Velger's subsequent attempts to secure work included taking over one hundred civil service examinations, of which he passed ninety-seven per cent and scored many high marks. There is every indication that he would have been successful but for the allegations in his New York City Police Department file.[4] In the private sector, he applied for numerous positions,[5] but was ultimately refused employment; again his personnel

4 A typical example was the Plainfield, New Jersey, Police Department. It told Velger that his hiring date would be three weeks from the receipt of its notification unless a character investigation required that he be turned down. He was notified but then never hired. Other police positions included: the police departments of Yonkers, N.Y., Jersey City, N.J., and Washington, D.C.; the Triborough Bridge Authority; the Executive Protective Service; Suffolk County Police; and others.

5 Among the companies to which Velger applied for security police positions were American Bank Note Company, Bonwit-Teller, several Manhattan banks, and the Penn Central Railroad.

file seems to have prevented his employment.[6]

The trial court dismissed the complaint in two stages: first, by holding that Velger's status was probationary and hence he had no property right in the position, and, second, by finding that he had failed to meet his burden of proof that a stigma had attached because of his discharge. Judgment was entered for the City of New York and its officials on all issues. We do not agree. We find it unnecessary to decide whether Velger had a property right in his position and we do not reach that point. We do, however, find that a stigma attached because of his dismissal and that he was, therefore,

6 Ironically, at the time of trial Velger was employed on a probationary basis in a clerical position with the New York City Police Department. That job, too, was terminated at the expiration of the probationary period on January 17, 1975.

entitled to a hearing to confront the allegations placed in his personnel file. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972).

1. The Nature of the Charge on which Dismissal was Predicated:

It stands to reason that any charge that justifies dismissal is a most serious one. Here the exact language of the charge is not known,[7] but it appears to state that Velger "while still a trainee ... had put a revolver to his head in an apparent suicide attempt." Such a

7 Appellees resisted all efforts to obtain from them an explanation for the dismissal. Their response to Velger's formal interrogatories prior to trial included the claim that as a probationary patrolman he had no right to a statement of reasons for his termination. The testimony of the Penn Central officer, who investigated Velger's personnel file about the apparent suicide attempt report, was that the attempt incident was the reason for the dismissal. No other explanation was ever offered. Indeed, appellees resisted Penn Central's attempts to verify the report.

charge suggests to most of us such severe mental illness that it deprives one of the capacity to do any job well. It thus differs from the usual derogatory charge that is levelled at the capacity to do a specific job. Certainly, no more serious charge could be levelled at a police officer.

Moreover, the "rookie" officer has the greater hazard because he has none of the job protection guarantees that a seasoned officer enjoys. Ordinarily, he can be severed from the force without any notice of charges or a hearing being afforded him. Police authorities must, therefore, exercise the greatest degree of care in dealing with probationary officers to make certain not only that their discharge decisions are just but also that their reasons are kept confidential. Here New York City admits that it grants ready

access to its confidential personnel files to all governmental police agencies. In a case like the present one this could have the effect of closing the public sector to the probationary police dischargee and depriving him of employment in the largest and most desirable segment of his profession. The same result, in reality, is true in the private sector because New York City answers all inquiries for permission to see personnel files with the suggestion that inspection will be permitted with the consent of the dischargee. The dischargee is then placed "between the devil and the deep blue sea"; he loses whatever his choice. Who would employ an applicant who refused to give authorization? Who would employ one who gives authorization but whose file suggests that he made an "attempt" at suicide?

2. The Requirements of Procedural Due Process:

In light of the rationale behind both Board of Regents v. Roth, supra, and Perry v. Sinderman, supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee. Perhaps the discharge of a police officer is stigmatization per se. But we need not announce such a "brass collar" rule, for here the record reeks of the stigma that attached to Velger. The stigma foreclosed employment in both the public and private sectors. First, the manner in which personnel records are made available to inquiring public and private employers

insures that serious derogatory information in the file will stigmatize the dischargee. Second, the lax procedures in the practice of the New York City Police Department, as it discharges probationary officers without a statement of reasons or hearing, encourage the very harm that Roth and Perry urged be prevented. Here, from what little is known, Velger's accusers are not named and his actions are not described in any detail. The framework in which the alleged suicide attempt occurred included the presence of five fellow trainees, but no explanation exists for such an unlikely audience to an attempted suicide. No date or hour for the incident is specified, although it allegedly occurred while Velger was a trainee. His appointment to patrolman was seven months old and he had been with the force three years before the discharge

action, supposedly based upon the earlier incident, was taken.

As this Court so well stated in Lombard v. The Board of Education of the City of New York, 502 F.2d 631 (1974):

> A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has not opportunity to meet the charge by confrontation in an adversary proceeding. Id. at 637-8.

3. The Remedy:

We, therefore, hold that the findings of the trial court that no proof of stigma was made are clearly erroneous. This result need not have any material impact upon the practice of not affording a hearing to probationary dischargees. The appellees could change their disclosure procedures to prevent the dissemina-

tion of derogatory and possibly stigmatizing allegations unless notice of the charges and a hearing are first afforded to the dischargee. Otherwise, rudimentary procedural due process requires that such notice of charges and a hearing be afforded before a dismissal can be effective. Reversed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELLIOTT H. VELGER,

Plaintiff,

-against-

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

----------x

OPINION

73 Civ. 2350 (HFW)

HENRY F. WERKER, D. J.

Plaintiff, Elliott H. Velger, has brought this action against the City of New York, the Police Commissioner of the City of New York, the Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham D. Beame as Comptroller of the City of New York, for injunctive and declaratory relief as well as damages. Asserting jurisdiction

under 28 U.S.C. §§ 1331 and 1334(3), (4), 42 U.S.C. §§ 1981 and 1983, and the Fourteenth Amendment, he alleges that after three years with the New York City Police Department as a "police trainee," and six months as a "probationary patrolman," he was discharged without a hearing or statement of charges against him. He asks this court to (a) declare such termination violative of the due process and equal protection clauses of the Fourteenth Amendment, (b) issue a writ of mandamus directing defendants to reinstate him as a patrolman, (c) enjoin defendants from refusing to employ him in the future, and (d) grant him $50,000 in damages.[1] After a trial on the merits, this court finds against plaintiff on all issues.

In an earlier decision on defendants' motion to dismiss for failure to state a claim, District (now Court

of Appeals) Judge Murray Gurfein found that as probationary patrolman with no contractual tenure, Mr. Velger had no legitimate expectation of continued employment as a patrolman, and therefore was deprived of no property interest when discharged. Velger v. Cawley, 366 F. Supp. 874, 887-78 (S.D.N.Y. 1973). In Judge Gurfein's view, the only issue which saved Mr. Velger's case from dismissal was whether in discharging him defendants imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities. Id. at 878. In Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court ruled that such stigmatization without prior notice and the opportunity for a hearing constitutes deprivation of liberty with-

out due process of law.

In plaintiff's amended complaint the issue of stigma is raised by what he has chosen to call the first, third and sixth "causes of action." As to that issue, the court finds the following facts:

- Plaintiff served in the New York City Police Department as a police trainee from January 31, 1970 to August 15, 1972, a few days after his 21st birthday, when he was appointed a probationary patrolman. Six months later, by letter dated February 8, 1973, the Police Department discharged him. The letter indicated that the Department "has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner."

- After termination plaintiff applied for security officer positions in the private sector, and took civil service examinations for both state and federal government service, passing 97% of them. He was subsequently interviewed for several of the civil service positions, but not recalled. On each application form, where

asked to state whether he had ever been dismissed by an employer, plaintiff indicated his Police Department dismissal.

- One of the private sector jobs plaintiff sought was that of security officer with the Penn Central Railroad. After placing fourth in a field of 20 applicants tested, he was hired by the railroad for a probationary period on September 10, 1973. During the probationary period he was asked to sign, and did sign, a release form authorizing Captain Lonnie Hamilton of the Penn Central police to review his New York City Police Department records, and waiving any claims he might have against the Department for allowing Captain Hamilton to see them.

- The Police Department refused to release any information about Mr. Velger to Captain Hamilton by letter. When he phoned, he was informed that only if he were to present the waiver letter in person, in New York, would he be allowed to examine Mr. Velger's file. On doing so Captain Hamilton was given the personnel file, from which he gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to

his head in an apparent suicide attempt.

- Captain Hamilton tried to verify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In light of his previous failure to obtain information by letter, Captain Hamilton declined to pursue the matter further; he returned to the Penn Central and recommended that Mr. Velger be terminated. This was done on November 11, 1973.

- The unwritten policy of the present administrative manager of Police Department personnel files is that no information whatsoever is released about former employees to any one in the private sector. (No evidence was introduced as to the policy of his predecessor during the time period in issue.) Unwritten policy with respect to government police agencies is that background information on former employees is available to those agencies as a matter of course. Although information as to why an employee was discharged is not formally available to such agencies, it appears to be possible for them to obtain it informally.

It is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants. He has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof.

As to the other five so called "causes of action" in plaintiff's amended complaint, none merit lengthy discussion. The eighth must be dismissed for lack of standing. See n. 1, supra. The seventh and fifth fail to state a claim on which relief can be granted. The fourth was previously decided against plaintiff by Judge Gurfein. 366 F. Supp. at 877-78. Lastly, the second does not state a cause of action. See Koscherak v. Schmeller, 363 F. Supp. 932 (S.D.N.Y. 1973) at 935-36.

Judgment is hereby granted for defendants without costs.

SO ORDERED

Dated: New York, New York
December 10, 1974.

HENRY F. WERKER
U.S.D.J.

ELLIOTT H. VELGER v. DONALD F. CAWLEY, et al. 73 Civ. 2350 (HFW)

NOTES

1. He also asks that section 3 of the New York Public Officers Law and section 58 of the New York State Civil Service Law, establishing minimum age limits for certain public officer positions, be declared unconstitutional. For this purpose he requests the convening of a three-judge court. Plaintiff fails to include in his prayer for relief, however, a request that the enforcement of those statutes be enjoined. Under 28 U.S.C. §2281 a three-judge court is required only when such an injunction is sought. Astro Cinema Corp., Inc. v. Mackell, 422 F. 2d 293, 298 (2d Cir. 1970). See also Wright, Federal Courts at 190 (2d ed. 1970).

This court fails to see in any case how plaintiff has standing to challenge those statutes. Section 58, by its own terms, does not apply to the New York City Police Department. Furthermore, plaintiff has made no showing as to either section that he is, or has been, in any way harmed by them. (He likewise has made no offer of proof as to how or why they are unconstitutional.) Plaintiff's eighth cause of action, seeking a declaration of unconstitutionality, must therefore be dismisssed.

APPENDIX

Supreme Court, U. S.
FILED
SEP 1 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-812

MICHAEL J. CODD, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

—v.—

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1975
CERTIORARI GRANTED JUNE 28, 1976

INDEX

WITNESSES FOR PLAINTIFF

WITNESS FOR DEFENDANTS

APPENDIX

Docket Entries

Jury demand date: 1-7-75

75-1042

ELLIOTT H. VELGER,

against

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York.

For plaintiff:

SAMUEL RESNICOFF
280 Broadway,
N.Y.C. N.Y. 10007
DI 9-3896-7

For defendant:

Corporation Counsel—City of New York
Municipal Building, NYC 10007
Irwin Herzog of counsel.

Docket Entries

Date	*Proceedings*
5-25-73	Filed Complaint. Issued Summons.
5-13-73	Filed Deft's Notice of Motion to Dismiss complaint returnable 6-30-73, 9:30 A.M.
7-10-73	Filed Defts Memorandum of Law in support of Motion to dismiss Complaint.
7-18-73	Filed affdvt. and notice of motion by pltff. for an order convening a Three-Judge District Court.—ret. 7-30-73
7-18-73	Filed pltffs memorandum in support of complaint and in opposition to defts motion to dismiss.
7-10-73	Filed summons and Marshals return, served: Patrick V. Murphy, by M. Lesh on 7-2-73 Donald F. Cawley, by J. Adams on 5-3-73 Patrick V. Murphy unable to serve on 6-5-73 Garry I. Bronstein by S. Abelow on 5-31-73 Abraham D. Beame by P. Kalicky on 5-31-73
7-26-73	Filed defts memorandum of law in opposition to the convening of a Three Judge Court.
10-15-73	Filed defts. revised memorandum of law in support of the motion to dismiss the complaint and in oppos. to pltfs. motion for a statutory 3 judge court.

Docket Entries

Date	*Proceedings*
11- 1-73	Filed Opinion No. 39973 that the motion to convene a three-judge court is denied. The motion of the defendants to dismiss the complaint is denied.—Gurfein, J. m/n
11- 1-73	Filed defendants memorandum in support of defts. motion to dismiss.
11- 1-73	Filed supplemental brief on behalf of the plaintiff
11- 1-73	Filed affdvt. of Elliott H. Velger (pltff.)
2-28-74	Filed memo endorsed on deft's affdvt. of Irwin L. Herzog; In view of pltf's affdvt. in opposition to deft's motion for summary judgment, I will deny summary judgment and suggest that plaintiff serve an amended complaint incorporating the substance of his affdvt. If this is done promptly and issue is joined promptly, discovery may proceed with a view to trial of the action in June. So ordered.—Gurfein, J. m/n
2-28-74	Filed plaintiff's affidavit of Irwin L. Herzog. (memo end. on this affdvt.)
2-28-74	Filed pltf's affdvt. of Elliott H. Velger re deft's motion for summary judgment.
3-13-74	Filed stip. and order that plaintiffs time to serve an amended complaint is ext. to March 22, 1974—Gurfein, J.
3-15-74	Filed Amended Complaint.

Docket Entries

Date	*Proceedings*
3-20-74	Filed deft's interrog.
3-20-74	Filed Answer of defendants
4-16-74	Pre-trial Conference held by Gurfein, J.
5 -9-74	Filed plaintiffs answers to interrog.
5- 9-74	Filed plaintiffs interrogatories
6-14-74	Filed stip. and order that defts' time to answer pltf's interrog. is ext. to 9-20-74—Gurfein, J.
9-10-74	Filed Answers to Interrogatories of Defts.
9-23-74	Pre-trial Conference held by Werker, J.
11-25-74	Non-jury trial begun before Werker, J. and concluded. Decision reserved—Werker, J.
12-11-74	Filed Opinion No. 41558. . . . After a trial on the merits, this Court finds against plaintiff on all issues. Judgment is hereby granted for defendants without costs. So ordered.—Werker, J. m/n
12-12-74	Filed Judgment and order that defendants have judgment against the pltf dismissing the complaint without costs.—Clerk.
1- 7-75	Filed notice of appeal by plaintiff to the USCA for the 2nd Circuit from judgment dismissing the complaint, copy to Corporation Counsel.

A True Copy

RAYMOND F. BURGHARDT, Clerk
By A. E. THOMPSON
Deputy Clerk

Complaint for a Writ of Mandamus; Preliminary Injunction; Permanent Injunction, and for Declaratory Judgment Fixing and Determining the Rights of Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73 Civ. 2350

ELLIOTT H. VELGER,

Plaintiff,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

I

PRELIMINARY STATEMENT

Plaintiff, a citizen of the United States and of the state of New York, successfully competed in an open competitive written examination for Patrolman, Police Trainee Police Department, City of New York. He was duly appointed from an eligible list duly established by the New

Complaint for a Writ of Mandamus; Preliminary Injunction; Permanent Injunction, and for Declaratory Judgment Fixing and Determining the Rights of Plaintiff

York City Civil Service Commission as a result of said examination on January 31, 1970. On February 16, 1973, he was dismissed from his position of Patrolman without charges and without a hearing.

II

Jurisdiction

Jurisdiction is conferred upon the Court as follows:

(a) Section 1331, Title 28, U.S.C., in that the damages to plaintiff exceeds $10,000.00 and the matter arises under the United States Constitution, laws and treaties;

(b) The Fourteenth Amendment to the Constitution of the United States;

(c) 28 U.S.C. 1343(3) (4) in that plaintiff seeks relief under 42 U.S.C. Section 1981 and Section 1983 and alleges deprivation under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States, or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;

(d) Plaintiff's action for declaratory and injunctive relief and for damages is authorized by:

Complaint for a Writ of Mandamus; Preliminary Injunction; Permanent Injunction, and for Declaratory Judgment Fixing and Determining the Rights of Plaintiff

1. 28 U.S.C. Sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments, and

2. 42 U.S.C. Section 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III

Basis For Action

Plaintiff is a citizen of the United States and of the State of New York. The defendant New York City Civil Service Commission duly announced an open competitive written examination for the position of Patrolman, Police Trainee, Police Department, City of New York. Plaintiff filed a written application to compete in said examination. The Civil Service Commission after having conducted an investigation, determined that plaintiff met all of the eligibility requirements for the position and permitted plaintiff to compete in said examination. Plaintiff successfully competed in said written examination. Thereafter, he passed the required medical and physical tests and the Civil Service Commission certified plaintiff as eligible for appointment as Patrolman, Police Trainee. The Police Department, City of New York, conducted its own investigation and after a pre-appointment physical examination

and an investigation of plaintiff's police record, scholastic background and employment appointed plaintiff from the eligible list on January 31, 1970.

Prior to his appointment as a Patrolman, it was incumbent upon plaintiff to purchase the necessary equipment, gear and uniform which approximated $500.00. On January 31, 1970, plaintiff enrolled in the John Jay College of Criminal Justice and Long Island University, which were federally funded programs. At the time of his dismissal as hereinafter alleged, plaintiff had earned 22 credits at the John Jay College of Criminal Justice and 21 credits at Long Island University.

On February 16, 1973, plaintiff received a written notice which advised him that the Police Commissioner had decided not to retain him as an employee of the Police Department "your capacity having been unsatisfactory to the Police Commissioner". Annexed herewith and marked Schedule "A" is a copy thereof. At the time of his dismissal, plaintiff was earning $11,200.00 per annum. Because of said dismissal, plaintiff was compelled to discontinue his courses at the John Jay College of Criminal Justice and Long Island University which would have culminated in a Police Science Degree. Both Universities are now claiming reimbursement.

At the time of his dismissal, plaintiff was not served with written charges and specifications and was not given a hearing. His summary dismissal besides being arbi-

trary, capricious and unreasonable, was in violation of plaintiff's constitutional right to procedural due process and the equal protection of the laws. Petitioner could not be dismissed at will.

IV

First Cause Of Action

The refusal and failure on the part of the local Police Department officials to specifically state the reasons for plaintiff's dismissal and afford him an opportunity to rebut and contradict any accusations made against him was and is contrary to *Board of Regents* v. *Roth*, 408 U.S. 546; *Perry* v. *Sinderman*, 408 U.S. 593, and *Goldberg* v. *Kelly*, 397 U.S. 254.

V

Second Cause Of Action

The Civil Rights Act prohibits discrimination in employment because of race, creed, color, religion or national origin. Because of the refusal and failure on the part of the local Police Department officials to specifically advise plaintiff of the reasons for his dismissal, plaintiff is unable to determine whether his civil rights were violated, and therefore alleges that his summary dismissal under the circumstances was illegal and improper.

VI

Third Cause Of Action

By refusing and failing to specifically advise plaintiff of the reasons for his dismissal and to afford him an opportunity to controvert the basis for the alleged dismissal, plaintiff has been denied procedural due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

Fourth Cause Of Action

The refusal and failure on the part of defendants to give a specific reason for the dismissal of plaintiff was and is in violation of his First and Fifteenth Amendment rights to the Constitution of the United States and denies to plaintiff his right to earn a livelihood. Plaintiff had a property right to his position which could not be summarily taken away. As a result of said dismissal, plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service Examinations for employment in the City and State of New York for at least one year.

VIII

Fifth Cause Of Action

The local Police officials have intentionally and purposefully discriminated against plaintiff. Their action is

invidious and intentional and was and is intended to deny to plaintiff his constitutional right to hold public office.

IX

Prayer For Relief

Wherefore, plaintiff respectfully prays that this Honorable Court:

1. Issue a writ of mandamus directing defendants to reinstate plaintiff to his quondam position of Patrolman, Police Department, City of New York, retroactive to February 16, 1973;

2. Enter a declaratory judgment against all defendants declaring that the action of defendants in terminating plaintiff's employment without charges and without a hearing to be in violation of the Constitution of the United States, in that it denies to plaintiff procedural due process and the equal protection of the laws;

3. Grant a temporary restraining order restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from continuing to cause irreparable harm to plaintiff by refusing to employ him in his position and to employ him in civil service positions in the competitive class to which he may be entitled and that would otherwise be available except for the illegal action on the part of defendants;

Complaint for a Writ of Mandamus; Preliminary Injunction; Permanent Injunction, and for Declaratory Judgment Fixing and Determining the Rights of Plaintiff

4. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to employ plaintiff in his position of Patrolman, Police Department, City of New York;

5. Enter a final judgment in favor of plaintiff vacating, annulling and setting aside his dismissal from his competitive civil service position of Patrolman which was accomplished without charges and without a hearing on February 16, 1973;

6. Grant plaintiff damages in the sum of $50,000.00 because of the injury to plaintiff's reputation and good name resulting in the severe limitation of future employment opportunities;

7. That this Court retain jurisdiction of this action until such time as defendants comply with the provisions of the Fourteenth Amendment and the statutes enumerated above, and

8. Grant plaintiff such additional alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted

SAMUEL RESNICOFF,
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, New York, 10007
(DI 9-3896)

Schedule A, Letter from Police Department, February 8, 1973, Annexed to Foregoing Complaint

THE CITY OF NEW YORK

POLICE DEPARTMENT
New York, N. Y. 10013

February 8, 1973

Probationary Patrolman
Elliott H. Velger
Shield No. 18079
P.A.R.T.S.

You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner.

Accordingly, he directs that you be given this notification in writing, to that effect, in accordance with the provisions of law and the rules of the City Civil Service Commission.

Effective 2400 hours, February 16, 1973, your services in the Police Department of the City of New York will be terminated.

PSR
Peter S. Ring
ASSISTANT DIRECTOR
POLICE PERSONNEL

Summons

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. ——

ELLIOTT H. VELGER,

Plaintiff,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

To the above named Defendants:

You are hereby summoned and required to serve upon Samuel Resnicoff, Esq., plantiff's attorney, whose address 280 Broadway, New York, New York, 10007 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment

Summons

by default will be taken against you for the relief demanded in the complaint.

THOMAS E. ANDERSON,
Clerk of Court.

E. H. BECK,
Deputy Clerk.

(Seal of Court)

Date: May 20, 1973

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Notice of Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2350 MLG

ELLIOTT H. VELGER,

Plaintiff,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

PLEASE TAKE NOTICE that upon the complaint herein, the defendants will move this Court, at a regular session thereof to be held at the United States Courthouse, Foley Square, New York, New York, on the 30th day of July, 1973 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing this action pursuant to Federal Rules of Civil Procedures 12(b)(1) and 12(b)(6) on the grounds that this court lacks jurisdiction over the subject matter in

the controversy herein and that the complaint fails to state a claim upon which relief can be granted.

Dated: New York, New York
June 11, 1973.

NORMAN REDLICH
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
566-2182
By: IRWIN HERZOG
Assistant Corporation Counsel

To: Samuel Resnicoff, Esq.
280 Broadway
New York, N. Y. 10007

Schedule B, Examinantion No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

(ILLEGIBLE)

Patrolman (P.D.) #8046

and

Patrolman, Police Trainee (P.D.)

No. 8046

PATROLMEN, POLICE TRAINEE
(POLICE DEPARTMENT)

This examination is open only to men.

A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.

Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates.

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Salary, Vacancies and Benefits (Patrolman): The entrance salary is $7,932 per annum at present. Patrolmen receive increments of $221 at the end of their first year, $551 at the end of their second year and $679 at the end of their third year in the Police Department. The salary reached through these increments is $9,383 per annum. In addition, there is an annual uniform allowance of $185, a holiday pay allowance of eleven days per year, a $180 contribution per man per year by the City to a welfare fund, and a $1 per day contribution per man by the City to an annuity fund. Vacancies occur from time to time.

Police Trainee (Police Department): The entrance salary is $4,000 per annum. There will be an increment of $240 per annum after each year of trainee service up to a maximum of four increments. There will be a considerable number of positions in the Police Department under this program.

Many benefits are, or may be, enjoyed by New York City employees. These benefits include generous annual leave, sick leave, membership in a liberal pension system, the Social Security System, a health insurance plan wholly paid for by the City of New York and the blood credit program.

Applications: *Filing Period*—Pre-application forms issued and received Monday through Friday from 9 a. m. to 5 p. m., except Thursday from 8:30 a. m. to 5:30 p. m. and Saturdays from 9 a. m. to 12 noon, from June 5, 1968 through June 25, 1968.

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Pre-application forms are obtainable free either by the applicant in person or by his representative at the Application Section of the Department of Personnel at 49 Thomas Street, New York, N. Y. 10013. They will also be mailed on request provided that the request to the above section and address is accompanied by a stamped (6 cents) self-addressed 9½-inch envelope for each application requested. All such mail requests must be postmarked not later than June 18, 1968. A pre-application form submitted by mail must be postmarked no later than the last date for receipt of pre-application forms.

Pre-application forms are to be issued in person (but not received) at all branches of the public library systems in the various boroughs in New York City, Mount Vernon, New Rochelle, White Plains and Yonkers.

Regular applications will be issued and accepted for filing in person only at the time and place of the written test only from those who filed pre-application forms during the filing period.

Date and Place of Test: The written test is expected to be held July 20, 1968. This date is tentative only and may be changed if circumstances so demand.

Promotion Opportunities: The Administrative Code provides that Sergeants shall be selected from among Patrolmen of the First Grade, Sergeants are eligible for promotion examination to Lieutenant; Lieutenants are eligible for promotion examination to Captain.

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Time in service as a police trainee shall not be considered as service in the uniformed force for pension or retirement purposes, nor in computing seniority in a promotion examination, nor in granting advancement in grade as a Patrolman.

Age Requirements (Patrolman): The Administrative Code provides that only persons shall be appointed Patrolmen who shall be on the date of the written test less than 29 years of age; and the Public Officers Law provides that persons shall be at least 21 years of age at the time of appointment.

Exception: All persons who were engaged in military duty, as defined in Section 243 of the Military Law, subsequent to July 1, 1940, may deduct the length of time, not exceeding a total of six years, which they spent in such military duty from their actual age in determining their eligibility (Sub. 10a, Section 243, Military Law).

Police Trainee: Candidates must be at least 16 years of age on the date of the written test and at least 17 years of age at time of appointment.

At the time of investigation, applicants will be required to submit proof of date of birth by transcript of record of the Bureau of Vital Statistics or other satisfactory evidence. Any wilful misstatement may be cause for disqualification.

Minimum Requirements: At the time of appointment: (a) graduation from a four-year senior high school; or

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

(b) possession of a high school equivalency diploma; or (c) certification of having passed the New York State high school equivalency examination; or (d) an acceptable G.E.D. certificate issued by the Armed Forces.

At the time of appointment applicants must be United States citizens.

Applicants must not be less than 5 feet 7 inches (bare feet) in height and must approximate normal weight for height. Required vision, 20/30 in each eye separately, without glasses.

At the time of appointment as a Patrolman, residence in New York City, or in Nassau, Westchester, Suffolk, Orange, Rockland, or Putnam Counties is required. Also, at the time of appointment as a Patrolman, possession of a valid motor vehicle operator's license is required.

Proof of good character will be an absolute prerequisite to appointment. The following are among the factors which would ordinarily be cause for disqualification: (a) conviction of a misdemeanor or an offense, the nature of which indicates lack of good moral character or disposition toward violence or disorder; (b) repeated conviction of an offense, where such convictions indicate a disrespect for the law; (c) repeated discharge from employment where such discharges indicate poor performance or inability to adjust to discipline; (d) addiction to narcotics or excessive use of alcoholic beverages; (e) discharge from the Armed Forces other than the standard honorable discharge. In accordance with the provisions of the Administrative Code, persons convicted of a felony are not eligible for positions in the uniformed force of the Police Department. In addition, the rules of the City Civil Service Commission provide that no person convicted of petty larceny, or who has been dishonorably discharged by the Armed Forces shall be examined, certified or appointed as a patrolman.

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

The Police Commissioner has the right to appoint one out of three on each certification.

The rules of the City Civil Service Commission provide that no name shall be certified more than three times to the same appointing officer for the same or similar position, unless at such officer's request.

Those appointed as probationary Patrolman must serve a probationary period as provided in the Rules of the City Civil Service Commission existing at the time of appointment.

A police trainee will not be considered a member of the uniformed force or a peace officer.

Duties of Patrolman: To perform general police duties in the various branches of the department; to perform all additional functions for the rank prescribed by relevant laws, Rules and Procedures, orders or directives of the Police Department; and to perform special duties or assignments as directed by the Police Commissioner in his discretion.

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Duties of Police Trainee: Following orientation and training at the Police Academy, performs, under direct supervision, routine non-law enforcement tasks in Police Headquarters or field units; performs related work.

Examples of Typical Tasks (Police Trainee): Assists precinct personnel in the preparation of records, documents, correspondence, reports, filing, typing, etc., assists precinct detectives in clerical capacity; assists members of specialized units in their clerical tasks; operates switchboards.

Tests: Written, weight 100, 75% required.

The written test will be of the multiple-choice type and will be designed to test the candidates' intelligence, initiative, judgment and capacity to learn the work of a police trainee and a patrolman. It may include questions on police situations, reading comprehension, arithmetic reasoning and vocabulary.

Candidates who pass the written test will be required to pass a qualifying medical test and a qualifying physical test. No second opportunity will be given to candidates who fail the qualifying physical test; or who fail to appear for the qualifying physical test, except those on active military duty.

The physical test will be designed to test the strength, agility, and power of candidates. Candidates will take the physical tests at their own risk of injury, although every effort will be made to safeguard them. Medical examination will be required prior to the physical test and the Department of Personnel reserves the right to exclude from the physical test any candidate who is found medically unfit. Candidates will be required to achieve a minimum mark of 70% or higher on the physical test in order to qualify. Medical and physical requirements as posted on the Department of Personnel's Bulletin Board must be met.

Schedule B, Examination No. 8046, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Candidates shall be rejected for any deficiency, abnormality or disease that tends to impair health or fitness. Such causes for rejection include but are not limited to defective vision, heart and lung diseases, hernia, paralysis and defective hearing. A history of any psychoneurotic disorder may disqualify. Persons must be free from such physical or personal abnormalities or deformities as to speech and appearance as would handicap them in the performance of their duties as a Patrolman.

Candidates who fail to attain the pass mark set for any test, subject or part of the examination shall be deemed to have failed the examination and no further test, subject, or part of the examination shall be rated.

Candidates are warned to make full and complete statements on their application blanks and medical questionnaires. Misrepresentation is ground for disqualification.

The pertinent sections of the General Examination Regulations are also to be considered part of this notice.

DEPARTMENT OF PERSONNEL, Solomon Hoberman, Personnel Director; George Henry, Jr., Secretary.

Schedule C, Notice of Appointment, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

THE CITY OF NEW YORK
POLICE DEPARTMENT
240 CENTRE STREET
NEW YORK, N. Y. 10013

Page No. 21
Exam. No. 8046
List No. 1143
Appl. No. 04953

Elliott H. Velger
3535 Rochambeau Avenue
Bronx, N.Y. 10467

THIS IS NOT A NOTICE OF APPOINTMENT

Date January 13, 1970

Dear Sir:

Your name has been certified by the City Civil Service Commission for consideration of appointment to the position of Police Trainee. The salary is $4,000 per annum. The tenure of appointment is probably permanent. (Certified applicants are subject to conditions set forth by the City Civil Service Commission.)

Report promptly on 1/20/70 at 8:30 a.m., at the Medical Unit, 7th Floor of the Police Academy, 235 East 20th Street, Manhattan. Bring this letter, a pen, your *High School Diploma* and a photostatic copy of your *Birth Certificate* with you.

Schedule C, Notice of Appointment, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

If you are appointed your employment will be conditional contingent on the successful conclusion of your character investigation, medical examination and satisfactory work performance.

If you do not wish to be considered, sign the statement below, checking the reason for your declination, filling in the information required, and return to the Chief Clerk's Office, 240 Centre Street, New York 10013, immediately. No other form of declination is acceptable. If you do decline, please note that we may not make any further appointments from this list.

LOUIS L. STUTMAN
Chief Clerk

A declination of appointment or a failure to respond to this notice will result in your name being withheld from future certification. Thereafter your name can be restored only upon written request for such recertification to the Department of Personnel. Upon restoration of your name to the list, you will be placed at the end of the list for recertification.

DECLINATION OF APPOINTMENT

I hereby decline appointment for the reason checked:

☐ My inability to accept at this time. (State reason on back of this letter.)

☐ No High School Diploma.

Schedule C, Notice of Appointment, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Declination will continue in force for at least 60 days. They may be withdrawn on written application to Department of Personnel, 220 Church Street, New York, N. Y. 10013, with reason therefor.

Sign here .....

Address .....

Misc. 306

THE CITY OF NEW YORK
Department of Personnel
220 CHURCH STREET, NEW YORK, N. Y. 10013

NOTICE OF ELIGIBILITY

You have passed the examination taken by you for the position indicated.

Your ratings, and rank on the eligible list, are shown.

Elliott H. Velger
3535 Rochambeau Ave.
Bx, N. Y. 10467

TITLE: Patrolman, Police Trainee

Exam. No.: 8046

Veterans Pref. Status:

Schedule C, Notice of Appointment, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

Subject To:

Part: 3

Test Score: 88

Weight: 100

Adjusted Final Average: 88.000

List Number: 1143

Application Number: 04953

Schedule D, Order No. 209, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

POLICE DEPARTMENT
CITY OF NEW YORK

August 18, 1972.

Personnel Order No. 209

1. The following Police Trainees having satisfactorily completed servie as such trainees in accordance with Section 434a-8.0 of the Administrative Code, having reached the age of twenty-one years and having passed a medical examination were appointed to the position of Patrolman on Probation in the Police Department of the City of New York, at $10,699. per annum, and were assigned to the Police Academy, Recruits' Training School:

Effective August 15, 1972.

		Date of Birth	*Shield*
Salvatore P. Contrastano	865954	8-11-51	18187
Gary R. Duffy	865955	8-2-51	17514
Daniel J. Gilroy	865956	3-28-50	6851
Kenneth M. Licata	865957	6-21-51	17366
Robert E. Spottke	865958	8-9-51	18153
Elliott H. Velger	865959	8-8-51	18079

2. The following TRANSFERS and ASSIGNMENTS are ordered:

Schedule D, Order No. 209, Annexed to Affidavit of Elliott H. Velger, dated September 20, 1973

LIEUTENANT

To take effect 0800, August 21, 1972

Joseph P. Burbridge 832224, from 25th Precinct to 24th Precinct.

SERGEANT

To take effect 2400, August 20, 1972.

Robert Seignious 843270, from 107th Precinct to 24th Precinct.

Opinion of Gurfein, U.S.D.J., Denying Motions to Convene a Three-Judge Court and to Dismiss the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

Filed—U.S. District Court
Nov. 18, '73
73 Civ. 2350

Appearances:

SAMUEL RESNICOFF
Attorney for Plaintiff
New York, N.Y.

Opinion of Gurfein, U.S.D.J., Denying Motions to Convene a Three-Judge Court and to Dismiss the Complaint

NORMAN REDLICH, Corporation Counsel
Attorney for Defendants
New York, N.Y.

GURFEIN, D.J.:

This is an action against the Police Commissioner of the City of New York and other city officials by Elliott H. Velger who alleges that he was a Patrolman Trainee employed by the Police Department and that he was discharged without a hearing and without stated reasons other than his "capacity having been unsatisfactory to the Police Commissioner."[1]

He claims federal question jurisdiction, 28 U.S.C. §1331, violation of constitutional rights under the 14th Amendment, and deprivation of constitutional rights under 28 U.S.C. §1343(3) and (4). He seeks declaratory relief under 28 U.S.C. §§2201 and 2202, and Rule 57, Fed. R. Civ. P., and injunctive relief under 42 U.S.C. §1983.

The defendants have moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) Fed. R. Civ. P. for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The plaintiff moves under 28 U.S.C. §§2281 and 2284 for an Order to convene a three-judge court to declare

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[1] Since the complaint was filed it has been discovered that Velger was no longer a trainee but that he had been appointed a "Patrolman on Probation."

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Section 63 of the New York State Civil Service Law unconstitutional.

The complaint alleges that the plaintiff successfully competed in an open competitive written examination for "Patrolman, Police Trainee," and was duly appointed from an eligible list established by the New York City Civil Service Commission as a result of such examination on January 31, 1970. On that day, the plaintiff purchased $500 worth of necessary equipment, gear and uniform and enrolled in the John Jay College of Criminal Justice and Long Island University. On February 16, 1973, after three years of employment, the plaintiff received a notice of termination from the Police Department. At the time of his dismissal, he was earning $11,200 per annum. As a result of his dismissal he was forced to quit the colleges where he was studying for a Police Science Degree, and both Universities are now claiming reimbursement.

He alleges that: 1) the refusal to afford him a hearing is a denial of due process; 2) the refusal to state the reason for his dismissal makes it impossible for the plaintiff to determine whether his civil rights have been violated; 3) that his property right to his position has been summarily taken away, as a result of which dismissal "plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service Examinations for employment in the City and State of New York for at least one year."

The plaintiff seeks the following relief:

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1) Mandamus directing the defendants to reinstate plaintiff to his quondam position;

2) A declaratory judgment that he has been denied procedural due process;

3) A temporary restraining order restraining the defendants from continuing to refuse to employ him;

4) A preliminary and permanent injunction to the same effect;

5) A final judgment annuling his dismissal;

6) Money damages and

7) Alternative relief that may be proper.

It may be noted that the complaint does not attack the constitutionality of Section 63 of the New York Civil Service Law. Plaintiff seeks to do this only by the motion which asks for the convening of a three-judge court. That is not sufficient. A three-judge court may be convened only when the complaint justifies it. "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint." *Ex parte Foresky,* 290 U.S. 30, 32 (1933). See *Bartlett & Co. Grain* v. *State Corporation Commission,* 223 F. Supp. 975, 980-87 (D. Kansas, 1963); *Silver* v. *Queen's Hospital,* 53 F.R.D. 223 (D. Hawaii 1971). In any event, the attack on Section 63 of the New York Civil Service Law as unconstitutional based on "[t]he claim that the appointment of provisional and probation-

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ary employees not entitled to the protection of tenure is irrational is too frivolous to warrant discussion." *Russell* v. *Hodges,* 470 F.2d 212, 218 Fn. 6 (2 Cir. 1972). Since the Court of Appeals for this Circuit has already held the contention of the plaintiff "frivolous," there is no need to convene a three-judge court to consider it. *Ex parte Foresky, supra; Swift & Co.* v. *Wickham,* 382 U.S. 111, 115 (1965).[2]

Turning to the motion to dismiss, there is jurisdiction, based in part upon an alleged violation of the plaintiff's civil rights, 42 U.S. §§1981 and 1983 and the plaintiff need show no exhaustion of State administrative remedy. See *Freiser, Correction Commissioner, et al.* v. *Rodriguez et al.,* —— U.S. ——, slip op. No. 71-1369 (May 7, 1973). But cf. Burger, C.J., dissenting in *Perry* v. *Sinderman,* 408 U.S. 593, 603 (1972). He must, however, show standing based upon State law and a violation of due process under the Federal Constitution.

The Supreme Court has recently considered the elements of tenure which make it necessary to afford procedural due process to an employee, such as notice and the right to a hearing. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* supra.

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[2] Belatedly, even later than his motion to convene a three-judge court to declare Section 63 of the Civil Service Law unconstitutional, he now in his brief seeks to challenge Section 3 of the Public Officers Law on the ground that the requirement that the appointee attain the age of 21 years violates due process. That is not a proper way to raise the issue.

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In *Roth,* the Court held "that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract." See *Perry* v. *Sindermann,* 408 U.S. at 599.

In the case at bar the plaintiff had no contractual tenure. He was appointed as a police trainee on January 13, 1970. He was appointed to the position of "Patrolman on Probation in the Police Department of the City of New York" on August 18, 1972. At the termination of six months probationary service, he was discharged without a specification of charges or a hearing.

The Supreme Court has explained that a mere "unilateral expectation" of continued employment was not "property," and would not trigger due process guarantees. *Perry* v. *Sindermann,* supra, 408 U.S. at 603; see *Russell* v. *Hodges,* supra, at 216. His claim of tenure must be based upon State law. *Board of Regents* v. *Roth,* 408 U.S. at 578.

The New York courts have held that the Police Commissioner has power to determine whether or not a probationary patrolman is to receive permanent appointment, that the sole requirement in making the decision is that the Commissioner act in good faith, and that a hearing is not required. *Matter of Going* v. *Kennedy,* 5 A.D.2d 173, 178; N.Y.S.2d (1958). Since, as a matter of State

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law, the probationary patrolman has no legitimate expectation of tenure, he has no such "property" right as the Supreme Court defined in *Roth*.

The plaintiff seeks to counter the conclusion that he was merely a "patrolman on probation" by pointing out that the public notice of examination for "Patrolman, Police Trainee (Police Department)" recites that "[A] police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman Candidates."

Since the plaintiff was appointed shortly after his 21st birthday, he contends that he was actually appointed a Patrolman, rather than a "Patrolman on probation," despite the order of appointment itself.

The notice of examination for Police Trainee also included the following, however: "Those appointed as probationary Patrolman *must serve a probationary period* as provided in the Rules of the City Civil Service Commission existing at the time of appointment." (Emphasis supplied).

While the language of the Notice of Examination could have been clearer, the status of the trainee upon the attainment of his 21st birthday was mandated as probationary by Section 63 of the Civil Service Law.

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Though we talk in terms of the employee's "expectation," the test, I think, must be objective. That is to say, his tenure, whether express or implied, must be objectively determined. A unilateral expectation of employment is not enough. Of course, if the statute or rule did prescribe tenure, a failure by the appointing power to abide by its terms would not destroy the legitimate expectation. That is not the case here. I am constrained to hold that there has not been an adequate showing of a "property right." See *Manzinos* v. *Elliott, et al.*, —— F.Supp. ——, 72 Civ. 3125 (CHT), Feb. 28, 1973, per Tenney, J.

In the absence of a claim of violation of First Amendment right, the plaintiff must show that the State had made a charge that might damage his standing in the community or had imposed a stigma that "foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. In the case at bar there was no charge laid against the plaintiff. He was dismissed without the assignment of a reason. No stigma attaches to the mere loss of the opportunity to become a patrolman.

The complaint, which must be taken as true, alleges, however, that "[a]s a result of said dismissal, plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service Examinations for employment in the City and State of New York for at least one year." (4th "cause of action").

The court held a conference with counsel after the motions were filed, and requested the parties to furnish rele-

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vant information on whether this allegation is true. Neither party has done so. Accordingly, I must accept the allegations of the complaint as true. If this allegation is true, I think a sufficient showing of the violation of his rights has been shown to require procedure due process for the plaintiff on the part of the Police Commissioner.

As the pleading stands, I have no choice but to deny the motion to dismiss. On the other hand, a showing that the allegation is untrue by affidavit may suffice for summary judgment without a trial.

If the Commissioner had administrative discretion to act as he did without a hearing, the State court is presumably available, if the request is timely, for a determination of whether the action taken was "arbitrary and capricious." *Matter of Going* v. *Kennedy, supra,* 5 A.D. 2d at 176.

The motion to convene a three-judge court is denied. The motion of the defendants to dismiss the complaint is denied.

Dated: October 31, 1973.

M. I. GURFEIN
U.S.D.J.

Affidavit of Elliott H. Velger in Opposition to Motion for Summary Judgment

STATE OF NEW YORK
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

ELLIOTT H. VELGER, being duly sworn, deposes and says:

1. I am the plaintiff herein and submit this affidavit in reply to the affidavit of Assistant Corporation Counsel Irwin L. Herzog and in opposition to defendants' motion for summary judgment.

2. My summary dismissal from the Police Department, City of New York, after more than three years of continuous employment without charges, without a hearing, and without being given the reasons therefor, has operated to my prejudice.

3. I have had considerable difficulty obtaining employment in private industry. As soon as the prospective employer is advised of my dismissal from the Police Department, City of New York, I am rejected.

4. On September 10, 1973, I was hired by the Penn-Central Railroad Police Department as a Patrolman. I was required to serve a probationary period of three months. On November 12, 1973, my employment was terminated by the Penn-Central Railroad Police Department solely because of my dismissal from the New York City Police Department. I was further advised that my termination was necessary because of derogatory entries made in my personnel folder while in the Police Department.

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5. I have filed applications and have successfully competed in a number of civil service examinations for New York State and New York City positions. No one is barred from filing an application or taking an examination. I received passing grades for each of the examinations which I took, to wit: Police Administrative Aide, New York City Police Department; New York State Police Trooper; Yonkers, New York Police Department; Suffolk County, New York Police Department; Bridge and Tunnel Officer; and the recent examination for Patrolman, Police Department, City of New York. I also successfully passed other New York City positions which were of a non law-enforcement nature.

6. At the present time, I am unable to state whether the New York City Civil Service Commission or the New York State Civil Service Commission will disqualify me and mark me ineligible for appointment to the various positions for which I successfully competed. It is respectfully requested therefore, that this Honorable Court hold in abeyance its decision as to whether or not I will be or have been disqualified for future civil service employment pending final action to be taken by said Commissions on my eligibility for appointment to the other civil service positions for which I passed the examinations.

7. It might not be amiss to point out that I have also successfully competed in competitive civil service examinations outside the State of New York and in the Federal Civil Service for law-enforcement positions. I have not as yet been certified for appointment to any of the positions for which I successfully competed.

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8. This Court should judicially note that in every application for a civil service position, the candidate is required to disclose whether he had ever been dismissed from a civil service position. In all of the applications which I filed as indicated above, I set forth the fact that I was dismissed from the Police Department, City of New York, and also stated that this action was pending in this Court. All of the other agencies, both City, State, Federal and outside the State of New York, have requested me to sign an authorization permitting each of said agencies to obtain from the Police Department, City of New York, its personnel records pertaining to my employment.

9. I was terminated by the Penn-Central Railroad Police Department because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process.

10. The operating officials of the agency could not make adverse unilateral determinations and findings against me and place these derogatory statements in my personnel folder. I was entitled to notice and an opportunity to reply. Dismissal from the Police Department creates a

Affidavit of Elliott H. Velger in Opposition to Motion for Summary Judgment

stigma and prevents me from earning a livelihood. My right to procedural due process and the equal protection of the laws have been violated. I have a constitutionally protected interest and the unilateral action on the part of the agency was an adjudication of fact in which I had a property interest. Rudimentary procedural guarantees under the Fifth Amendment were violated. This is an issue which should be tried before this Court.

11. Further, the need for fairness is as urgent in the constitutional right to earn a living as elsewhere in the law, and as a general matter, the furnishing of reasons for denial would be the much fairer course. This would enable a reviewing Court to determine whether inadmissible factors have influenced the decision, and to determine whether discretion has been abused or civil and legal rights violated.

12. Should this Honorable Court be reluctant to set this issue down for trial, then I respectfully suggest that the personnel records be made available for the Court's inspection to determine whether or not the derogatory matters contained in my file should remain and operate to my detriment and prejudice the rest of my life.

WHEREFORE, it is respectfully requested that the motion for summary judgment be denied and that the matter be set down for trial. In the alternative, my personnel records should be produced for inspection and review by the Court.

ELLIOTT H. VELGER

(Sworn to February 20, 1974)

Endorsement

Civil Action No. 73-2350

VELGER

v.

CAWLEY, et al.

In view of plaintiff's affidavit in opposition to the defendants' motion for summary judgment, I will deny summary judgment and suggest that plaintiff serve an amended complaint incorporating the substance of his affidavit. If this is done promptly, discovery may proceed with a view to trial of the action in June

So ordered.

/s/ MURRAY L. GURFEIN
U.S.D.J.

February 26, 1974

Amended Complaint

PRELIMINARY STATEMENT

(1) This action was instituted on May 25, 1973. By notice of motion dated June 11, 1973, defendants moved to dismiss the action. This Court (GURFEIN, U.S.D.J.) denied the motion to dismiss, etc. (366 F. Supp. 874). Thereafter, by affidavit duly sworn to February 6, 1974, defendants moved for summary judgment. An affidavit in reply was submitted in opposition. GURFEIN, J., by an endorsement entered on or about February 28, 1974, granted plaintiff leave to submit an amended complaint.

AMENDED COMPLAINT FOR A WRIT OF MANDAMUS; PRELIMINARY INJUNCTION; PERMANENT INJUNCTION and FOR DECLARATORY JUDGMENT FIXING AND DETERMINING THE RIGHTS OF PLAINTIFF.

JURISDICTION

(2) Plaintiff, a citizen of the United States and of the State of New York, successfully competed in an open competitive written examination for Patrolman, Police Trainee, Police Department, City of New York. He was duly appointed from an eligible list duly established by defendant New York City Civil Service Commission as a result of said examination on January 31, 1970. On February 16, 1973, he was dismissed from his position of Patrolman on probation without charges and without a hearing.

Jurisdiction is conferred upon the Court as follows:

(a) Section 1331, Title 28 U.S.C., in that the damages to plaintiff exceeds $10,000.00 and the matter arises

under the United States Constitution, laws and treaties;

(b) The Fourteenth Amendment to the Constitution of the United States;

(c) The First Amendment to the Constitution of the United States;

(d) 28 U.S.C. 1343 (3) (4) in that plaintiff seeks relief under 42 U.S.C. 1981 and 1983 and alleges deprivation under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States, or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;

(e) Plaintiff's action for declaratory and injunctive relief and for damages is authorized by:

1. 28 U.S.C. Sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments, and

2. 42 U.S.C. Section 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

(f) Title 28, U.S.C. Sections 2281 and 2284 to declare Sections 3 of the New York Public Officers Law and Section 58 of the New York Civil Service Law unconstitutional.

Amended Complaint

BASIS FOR ACTION

(3) Plaintiff is a citizen of the United States and of the State of New York. The defendant New York City Civil Service Commission duly announced an open competitive written examination for the position of Patrolman, Police Trainee, Police Department, City of New York. Plaintiff filed a written application to compete in said examination. The Civil Service Commission after having conducted an investigation determined that plaintiff met all of the eligibility requirements for the position and permitted plaintiff to compete in said examination. Plaintiff successfully competed in said written examination. Thereafter, he passed the required medical and physical tests and the Civil Service Commission certified plaintiff as eligible for appointment as Patrolman, Police Trainee. The Police Department, City of New York, conducted its own investigation, and after a pre-appointment physical examination and an investigation of plaintiff's police record, scholastic background and employment, the then Police Commissioner of the City of New York appointed plaintiff to the position of police Trainee on January 31, 1970.

(4) Prior to his appointment as a Patrolman, it was incumbent upon plaintiff to purchase the necessary equipment, gear and uniform which approximated $500.00. On January 31, 1970, plaintiff enrolled in the John Jay College of Criminal Justice and Long Island University, which were federally funded programs. At the time of his dismissal as hereinafter alleged, plaintiff had earned 22 credits at the John Jay College of Criminal Justice and 21 credits at Long Island University.

Amended Complaint

(5) The civil service announcement released by the defendant New York City Civil Service Commission, provided as follows (Schedule "B"):

> "PATROLMAN, POLICE TRAINEE
> (Police Department)
>
> This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.
>
> Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

(6) Plaintiff's employment as a Police Trainee was satis factory. On August 8, 1972, plaintiff became twenty-one years of age. On August 15, 1972, plaintiff was promoted to the position of Patrolman on probation. There was no break or interruption in plaintiff's employment which commenced on January 31, 1970. At the time of his promotion, plaintiff's salary was increased from $6400.00 to $10,699.00 per annum.

(7) While at the Police Academy attending lectures and class sessions, plaintiff and others similarly situated did express opinions as to orientation, criminal enforcement,

etc., which were contrary to the Superior Officer's views. On occasion, plaintiff was informed that his views were contrary to established police procedure. Plaintiff, however, was neither served with charges nor officially reprimanded with respect thereto.

(8) On February 16, 1973, plaintiff received a written notice which advised him that the Police Commissioner had decided not to retain him as an employee of the Police Department—"your capacity having been unsatisfactory to the Police Commissioner" (Schedule "A" is a copy). At the time of his dismissal, plaintiff was earning $11,200.00 per annum. Because of said dismissal, plaintiff was compelled to discontinue his courses at the John Jay College of Criminal Justice and Long Island University which would have culminated in a Police Science Degree. Both Universities are now claiming reimbursement.

(9) At the time of his dismissal, plaintiff was not served with written charges and specifications and was not given a hearing. His summary dismissal besides being arbitrary, capricious and unreasonable, was in violation of plaintiff's constitutional right to procedural due process and the equal protection of the laws. Plaintiff could not be dismissed at will.

(10) Having been dismissed from his position with defendant Police Department, plaintiff experienced considerable difficulty in obtaining employment. According to plaintiff's affidavit sworn to February 20, 1974, he was hired by the Penn-Central Railroad Police Department as a Patrolman and was required to serve a probationary period of three months. On November 12, 1973, his em-

ployment was terminated solely because of the derogatory remarks and entries which were made and entered in his personnel folder while in the Police Department. Plaintiff was not aware of the derogatory remarks and entries which were placed in his personnel folder.

(11) According to plaintiff's affidavit sworn to February 20, 1974, plaintiff successfully competed in a number of competitive civil service examinations for New York City, New York State and Federal positions. Many of the positions were law-enforcement while others were of a non law-enforcement nature. Plaintiff received passing grades in the examinations for Police Administrative Aide, New York City Police Department; Bridge and Tunnel Officer, New York City, and the recent examination for Patrolman, Police Department. In the interest of expediency and to avoid duplication, the said affidavit is incorporated by reference as part of this amended complaint. Nevertheless, as part of plaintiff's disqualification because of his dismissal from the New York City Police Department as aforesaid, defendant Civil Service Commission refused and has failed to mark plaintiff eligible and certify him for appointment to all other New York City positions even though he passed the competitive civil service examinations for said positions.

(12) Plaintiff was terminated by the Penn-Central Railroad Police Department because of his record of employment in the Police Department, City of New York. Plaintiff claims he does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file. He was never given an opportunity to reply to or to rebut any such statements. Plaintiff is being deprived of his right to earn a living.

Amended Complaint

First Cause of Action

(13) The refusal and failure on the part of the local Police Department officials to specifically state the reasons for plaintiff's dismissal and afford him an opportunity to rebut and contradict any accusations made against him was and is contrary to *Board of Regents* v. *Roth,* 408 U.S. 546; *Perry* v. *Sinderman,* 408 U.S. 593, and *Goldberg* v. *Kelly,* 397 U.S. 254.

Second Cause of Action

(14) The Civil Rights Act prohibits discrimination in employment because of race, creed, color, religion or national origin. Because of the refusal and failure on the part of the local Police Department officials to specifically advise plaintiff of the reasons for his dismissal, plaintiff is unable to determine whether his civil rights were violated and therefore alleges that his summary dismissal under the circumstances was illegal and improper.

Third Cause of Action

(15) By refusing and failing to specifically advise plaintiff of the reasons for his dismissal and to afford him an opportunity to controvert the basis for the alleged dismissal, plainitff has been denied procedural due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Amended Complaint

Fourth Cause of Action

(16) The refusal and failure on the part of defendants to give specific reasons for the dismissal of plaintiff was and is in violation of his First and Fourteenth Amendment rights to the Constitution of the United States and denies to plaintiff his right to earn a livelihood. Plaintiff had a property right to his position which could not be summarily taken away. As a result of said dismissal, plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service examinations for employment in the City and State of New York for at least one year.

Fifth Cause of Action

(17) The local Police officials have intentionally and purposefully discriminated against plaintiff. Their action is invidious and intentional and was and is intended to deny to plaintiff his constitutional right to hold public office.

Sixth Cause of Action

(18) The action on the part of the Police Department employees by inserting derogatory matter, comments and remarks in plaintiff's personnel folder without affording plaintiff an opportunity to see, inspect, reply and to rebut such statements, has damaged plaintiff's standing in the community and has foreclosed his freedom to take advtantage of other employment opportunities. The stigma of unreliability and incompetency, etc., has barred plaintiff from earning a livelihood.

SEVENTH CAUSE OF ACTION

(19) Plaintiff under the First Amendment had the right to exercise free speech and was within his rights to offer constructive and salutary suggestions during lecture classes at the Police Academy. Plaintiff's remarks were neither offensive nor officious but were made in good faith.

EIGHTH CAUSE OF ACTION

(20) Pursuant to the provisions of 28 U.S.C., Sections 2281 and 2284, a three-judge court should be convened to declare Sections 3 of the New York Public Officers Law and Section 58 of the New York State Civil Service Law unconstitutional upon the ground that said sections are discriminatory, contradictory and unduly restrictive, in that it denies to plaintiff the right to be a Patrolman, Police Department, City of New York, because of his age and violates his procedural rights to due process and the equal protection of the laws.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Honorable Court:

A. Issue a writ of mandamus directing defendants to reinstate plaintiff to his quondam position of Patrolman, Police Department, City of New York, retroactive to February 16, 1973;

B. To convene a three-judge court to declare Section 3 of the New York Public Officers Law and Section

58 of the New York Civil Service Law unconstitutional.

C. Enter a declaratory judgment against all defendants declaring that the action of defendants in terminating plaintiff's employment without charges and without a hearing to be in violation of the Constitution of the United States, in that it denies to plaintiff procedural due process and the equal protection of the laws;

D. Grant a temporary restraining order restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from continuing to cause irreparable harm to plaintiff by refusing to employ him in his position and to employ him in civil service positions in the competitive class to which he may be entitled and that would otherwise be available except for the illegal action on the part of defendants;

E. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to employ plaintiff in his position of Patrolman, Police Department, City of New York;

F. Enter a final judgment in favor of plaintiff vacating, annulling and setting aside his dismissal from his competitive civil service position of Patrolman which was accomplished without charges and without a hearing on February 16, 1973;

G. Grant plaintiff damages in the sum of $50,000.00 because of the injury to plaintiff's reputation and good name resulting in the severe limitation of future employment opportunities;

H. That this Court retain jurisdiction of this action until such time as defendants comply with the provisions of the First and Fourteenth Amendments and the statutes enumerated above, and

I. Grant plaintiff such additional alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully sumbitted,

Samuel Resnicoff, Esq.
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, New York 10007
(DIgby 9-3896)

Answer

Defendants, answering the complaint herein by their attorney, Adrian P. Burke, Corporation Counsel of the City of New York, respectfully allege as follows:

1. Deny each and every allegation contained in paragraph "2" thereof, except admit that plaintiff is a former probationary patrolman employed by the New York City Police Department who was terminated during his probationary period without reasons or hearing on February 16, 1973, after successfully competing in an open competitive civil service examination for Patrolman/Police Trainee.

2. Admit the allegations contained in paragraph "3" thereof, except deny that the Civil Service Commission "determined that plaintiff met all of the eligibilty requirements for the position" [of probationary patrolman] and further deny that the Police Department conducted an investigation of plaintiff *prior* to his appointment as a probationary patrolman.

3. Deny each and every allegation contained in paragraph "4" thereof which states or implies that was ever appointed Patrolman and further deny knowledge or information sufficient to form a belief as to the truth of the allegations relating to plaintiff's education.

4. Deny each and every allegation contained in paragraph "5" thereof, especially deny that there is a Schedule "B" annexed to the amended complaint and respectfully refer the court to the Notice of Examination annexed hereto as Exhibit "I" for the full text and legal effect thereof.

Answer

5. Admit the allegations contained in paragraph "6" thereof, except deny that plaintiff's employment as a Police Trainee was satisfactory.

6. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "7" thereof, except admit that plaintiff was never reprimanded or served with charges due to his opinions offered while he was at the Police Academy or at any other time.

7. Deny each and every allegation contained in paragraph "8" thereof and especially deny that Schedule "A" is annexed to the amended complaint, except admit that on February 16, 1973, plaintiff received a written notice advising him that the Police Commissioner had determined not to retain him as an employee of the Police Department.

8. Deny each and every allegation contained in paragraph "9" thereof, except admit that plaintiff, a probationary employee, was not served with written charges and specifications or given a hearing prior to his dismissal.

9. Deny each and every allegation contained in paragraph "10" thereof.

10. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "11" thereof and further deny that the defendant Civil Service Commission has refused to mark plaintiff eligible or certify him for appointment to other positions due to his dismissal from the Police Department.

Answer

11. Deny each and every allegation contained in paragraph "12" thereof, except deny information or knowledge sufficient to form a belief as to why plaintiff was terminated by the Penn Central Railroad Police Department.

12. Deny each and every allegation contained in paragraph "13" thereof.

13. Deny each and every allegation contained in paragraph "14" thereof, and respectfully refer the Court to the Civil Rights Act for the full text and legal effect thereof.

14. Deny each and every allegation contained in paragraphs "15", "16", "17", "18", "19" and "20" thereof.

FURTHER ANSWERING THE COMPLAINT HEREIN AND AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE:

15. The complaint fails to state facts sufficient to constitute a claim for relief and should be dismissed as a matter of law.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

16. Plaintiffs employment as a Patrolman was at all times in a probationary capacity. Plaintiff never received a permanent appointment and was never permanently

employed or guaranteed permanent employment by the Police Department.

17. In terminating plaintiff, defendants made no charges against him impugning either his honesty or integrity.

18. Plaintiff's termination in no way foreclosed his future employment.

19. Plaintiff was therefore not deprived of either property or liberty by his termination.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

20. Plaintiff's claim that he has been denied due process of law has already been adjudicated by this court and should not be re-litigated.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

21. Section 3 of the New York Public Officers Law is in all respects legal, proper and constitutional.

22. Section 58 of the New York Civil Service Law is in all respects legal, proper and constitutional.

23. Accordingly, plaintiff's allegations that these two statutes are unconstitutional are frivolous and no three judge court should be convened.

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

24. Plaintiff has not been injured by the operation of Section 3 of the New York Public Officers Law or by Section 58 of the New York Civil Service Law.

25. Accordingly, plaintiff has no standing to challenge the aforementioned statutes.

AS AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

26. Plaintiff has at no time been punished, served with charges, reprimanded, suspended, dismissed or in any other way disciplined by the defendants for his statements or opinions expressed at any time.

27. Plaintiff's rights guaranteed by the First Amendment to the United States Constitution have not been limited, abridged, violated, chilled or trammelled upon by the defendants in any way.

AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

28. There is no rule, regulation or policy by which the Civil Service Commission disqualified plaintiff due to his dismissal by the Police Department. For a further re-

buttal of plaintiff's claim that he has been disqualified for future civil service employment, the court is respectfully referred to the affidavit of Irwin L. Herzog, annexed hereto as Exhibit "II."

AS AND FOR A EIGHTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

29. The individual defendants herein are named only in their official capacities, and in such capacity are not "persons" within the meaning of 42 USC §§1981 and 1983 and therefore are not liable to plaintiff and this court lacks jurisdiction over the subject matter.

30. Even if found amenable to suit under 42 USC §§1981 and 1983, the individual defendants herein have at all times acted legally, constitutionally and in good faith and hence are not liable to plaintiff for damages under any legal theory.

AS AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN; DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

31. The defendant City of New York is a governmental entity and not a "person" within the meaning of 42 USC §§1981 and 1983 and therefore is not liable to plaintiff.

WHEREFORE, defendants pray that this court grant judgment in their favor dismissing the complaint with pre-

judgment and further grant defendants the costs of this action.

ADRIAN P. BURKE
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Attorney for Defendants
Municipal Building
New York, New York 10007
Tel.: 566-2183/2192
By: IRWIN L. HERZOG
Assistant Corporation Counsel

Transcript of Hearing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
73 Civ. 2350

ELLIOTT H. VELGER,

Plaintiff,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York CITY CIVIL SERVICE COMMISSION, et al.,

Defendants.

November 25, 1974

Before:

HON. HENRY F. WERKER,
District Judge.

Appearances:

SAMUEL RESNICOFF, ESQ.
Attorney for the Plaintiff

Colloquy

ADRIAN P. BURKE, ESQ.
(Corporate Counsel)
Attorneys for the Defendants
By: IRWIN L. HERZOG, ESQ.

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[2] (Case called.)

Mr. Resnicoff: Plaintiff is ready.

Mr. Herzog: Defendant is ready.

The Court: Mr. Resnicoff?

Mr. Resnicoff: Yes.

If your Honor please, before we proceed, I preliminarily want to call your Honor's attention to the fact that it is conceded in this case that the plaintiff was dismissed or terminated without charges, without being given a reason, and without being given a hearing. That is conceded.

I also want to call your Honor's attention to the fact that we are relying very heavily on the recent decision handed down in July of this year by our Court of Appeals for this Circuit in that Lombard case.

In that case the Court went so far as to hold that the plaintiff there, who was a probationary non-tenured teacher, who was dismissed, that because of the stigma the Court held that the plaintiff was entitled to a hearing and reversed Judge Travia in the Eastern District, who had dismissed, even though the plaintiff in that action had brought two

Colloquy

Article 78 proceedings in the State Court, one of which was affirmed by the Appellate Division, went up to the Court of Appeals. But he came in under 1983 and 1343, and Judge [3] Gurfein in a very luminous decision, which was well received in Civil Service circles, held that where there is a stigma and it affects a man's livelihood and his ability to earn a living, Federal Court has jurisdiction.

I want to point out to your Honor—and I don't want to make a lengthy argument, because we are hoping we can finish the case today, and I think Mr. Herzog, my friend, joins me on the question of law—but I did want to give you some slight testimony which I want to do, I expect a few witnesses here. And the case is not going to take too long, because I am going to get right down to the nitty gritty.

But one thing is certain, Judge, just as sure as we are here in your courtroom this morning: that where a policeman is terminated and is given no reason, aside from the unfairness of it, there is a stigma immediately. Because in the community where he lives, the stigma arises from criminality, that he is either a thief, a briber or an extortionist.

As he indicated in his reply, and that is the reason why Judge Gurfein said we had better go to trial on this in view of the reply affidavit where he denied the motion for summary judgment and said, where Velger pointed out his difficulty in getting a job or a comparable job, that [4] there is a stigma.

Colloquy

That is the point in this case. Here is a young man. I think that the least that he was entitled to was to get a hearing, not now—this is late at this stage. He should have had a hearing before termination, where we could have our proof and come in. Because as is, I don't know what I am in a vacuum and so is this young fellow. I still don't know what he has been dismissed for.

In my interrogatories, they have indicated, in response, that we are not entitled to it. They have said so. "You are not entitled to it, because he doesn't have tenure," even though he had been working there for almost three years.

That, in short, is our case, Judge.

Mr. Herzog: I will be very brief, your Honor.

We agree that if there is stigma there must be some relief that the Court can give.

However, the question of whether or not he is entitled to a hearing and whether or not he is entitled to know the nature of the reason has already been decided by Judge Gurfein and has been denied by Judge Gurfein.

We are now up to a point where Judge Gurfein said the only issue is, if he can prove that he was stigmatized, then of course he can get some relief.

[5] However, your Honor, as Mr. Resnicoff says, the mere fact that a police officer who is dismissed from the force is immediately indicative of the fact that he is guilty of some crime or some fraud is not true. There are lots of reasons why he could have been relieved from the force. It could have been

for physical reasons, his health conditions. It can be just for failing his examinations. So this, of course, is not the stigma that Mr. Resnicoff is talking about.

When we are talking about stigma, your Honor, we are talking about the stigma as defined in Birnbaum against Trussell in United States Supreme Court, in Roth and Sinderman in that court. It is not just an ethereal possible concept, well, the fellow was on the police force and now he is not and therefore there is something wrong.

I mean, this is something that Mr. Resnicoff reads into it, and he has no right to imply that the general public is going to read into this.

Secondly, we hope to show, your Honor, and I think we have indicated in our briefs that are already in the file here, that if there is any stigma, it has to be stigma that was produced or induced by the defendants here and not just by the fact that these facts exist.

[6] The policy of the Police Department has always been: We don't give information to anybody, except through regular police channels, other police officials for police reasons.

So we have not made any publication.

Mr. Resnicoff is relying on Lombard. In Lombard the Board of Education sent out information in regard to this teacher that she was psychotic. We have not done that, and there is no proof of that here yet. And I don't believe that they will be able to prove that.

I say, your Honor, the only information that the Police Department releases is to police agencies for police purposes.

Mr. Resnicoff: I just say this in reply, Judge.

We have federal statutes which prohibit discrimination because of sex, age, religion—

The Court: You are out of court on Judge Gurfein's decision on that.

Mr. Resnicoff: No, I merely want to say this: If they don't give me a reason—no, Judge Gurfein did not put us out, because he put us back in when he took the position, in denying the motion for summary judgment, and said: Based on the statements made in the reply affidavit, we go to trial. This is what he said.

[7] The Court: Yes, but on a very narrow issue, and that is your proof that there is stigma. The mere fact that he has dismissed doesn't prove that.

Mr. Resnicoff: Well, I think it would be less than naive were we to assume anything else where a young man is dismissed from the Police Department without a reason, and they insist on the reason that they will not give a reason.

How do we know that he is not—

The Court: This is purely speculative, Mr. Resnicoff.

Mr. Resnicoff: It might be a violation of the civil rights.

The Court: Yes. But we don't declare violations of civil rights by speculation.

Mr. Resnicoff: No, but in our complaint I alleged a violation of civil rights.

The Court: You allege it, you must now prove it, and that is the purpose of this hearing. Right?

Mr. Resnicoff: All right.

Mr. Herzog: In that respect, your Honor, this Court has already ruled on that in both Russell against Hodges and Mancino.

The Court: All right.

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[8] ELLIOTT H. VELGER, called as a witness in his own behalf, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct examination by Mr. Resnicoff:

Q. Mr. Velger, how old are you? A. I am 23 years old, sir.

Q. When and were were you born? A. I was born August 8, 1951, at Park East Hospital in Manhattan.

Q. Are you single or married? A. I am single, sir.

Q. With whom do you live? A. I reside with my parents.

Q. Did there come a time when you took an examination for patrolman, police trainee and patrolman? A. Yes, sir.

Q. I show you Civil Service announcement number 8046—

The Court: Mr. Resnicoff, is there any problem about that?

Mr. Herzog: We concede all that.

[9] The Court: You concede all that. I have all the background.

Mr. Resnicoff: Very well. I withdraw that, Judge.

Q. You passed this examination and you were then appointed to what position? A. I was appointed to the position of police trainee.

Q. When was that? A. January 30, 1970.

Q. This is in the Police Department? A. Yes, sir.

Q. How long did you serve in that capacity? A. I served as a police trainee from January 30, 1970, until August 15, 1972.

Q. Were you required to serve a probationary period as a trainee? A. As a police trainee, no, sir.

Q. When did you become of age, 21 years of age? A. August 8, 1972.

Q. Did there come a time when you were appointed a patrolman on probation? A. Yes, sir.

Q. When was that? A. August 15, 1972.

[10] Q. How much later that you became 21? A. It was about 7 days after I reached the age of 21.

Q. As a patrolman on probation, were you required to serve a probationary period? A. Yes, sir. The Department stated I would serve a probationary period of one year.

Q. And that probationary period would expire when? A. August 15, 1973.

Q. Did there come a time when you were terminated? A. Yes, sir.

Q. Did you receive any charges? A. No, sir.

Q. Did you receive a hearing? A. No, sir.

Q. And when were you terminated? A. February 16, 1973.

Mr. Resnicoff: I believe, if your Honor please, annexed to the complaint is the letter of termination about unsatisfactory service. I won't go into that.

The Court: I think they will concede it.

Mr. Herzog: We will concede it.

The Court: Yes.

[11] Q. Tell us what efforts you made after you were dismissed from this position—I withdraw that.

And you were terminated, you say, when? A. February 16, 1973.

Q. How many more months did you have to go before your probationary period expired? A. About five.

Q. Tell us what efforts you made, first in Government, Civil Service-wise, to obtain employment?

What did you do? Please elaborate. A. Well, after I was dismissed from the Department, as to Civil Service jobs, I picked up Civil Service announcements from New York City; I picked up the Civil Service Weekly, the Chief, and I applied for as many Civil Service exams as I was eligible to take.

And I competed in these exams by taking various tests.

Q. In the applications which you filed for these various Civil Service tests, did you indicate the fact that you had been dismissed from the Police Department? A. Yes, sir.

Q. Had you been notified whether or not you passed these examinations? A. Yes, sir.

[12] Q. Did you pass these examinations? A. About 97 percent of the exams I took I passed.

Q. Have you ever been called for any of these examinations? A. Yes, sir.

Q. Tell us what happened. A. Well, I was called for one exam by the Executive Protective Service. I filled out various forms—

Mr. Herzog: Is that a Civil Service?

The Witness: Yes. It is a Government position.

Mr. Herzog: What Government?

The Witness: United States. And I never heard from them again.

I successfully passed the United States Post office exam. I was called down for hiring last Christmas. I filled out various forms that they required during the interview. And I was told they'd let me know about hiring. I never heard from them again.

Q. Did you indicate termination from the Police Department? A. Yes, sir, I did.

Q. In any of these forms that you filled out, did they ask you to indicate the reasons why you were terminated? A. Yes.

[13] Q. And what reason did you give, do you recall? A. Yes. I wrote that I had failed the final physical examination at the Police Academy.

I also was called by the Plainfield, New Jersey, Police Department.

And I was called down there for a preappointment interview. And I also filled out a personal history ques-

tionnaire. And I was told the hiring date would be in three weeks if the investigation was successfully completed.

I was never called down for hiring.

Q. Do they constitute all or most of the Civil Service applications that you filed? A. No, sir.

Q. What else did you file for? State and let us have the rest of the Government jobs. A. Well, for the United States Government I filed for Park Police, Border Patrol Agent.

Q. These are all examinations? A. Yes, they are. They are competitive, open competitive examinations.

Q. And you passed these examinations? A. Yes, sir.

Q. Most of them were written examinations? [14] A. All of them were written examinations.

At the New York State level I applied for New York State Trooper, Suffolk County Police Officer and Yonkers Police Officer.

I also applied out of State for an open competitive examination. In New Jersey I applied for East Orange, Plainfield and Jersey City. The East Orange exam was called off. I successfully passed Plainfield and Jersey City.

On the New York City level, oh, I have taken Triborough Bridge and Tunnel Authority Officer, Sanitation Man, Corrections Officer, Transit Authority Railroad Clerk.

Q. Did you pass these examinations? A. Yes, sir. Many of them with high marks.

Q. Did you indicate in your application that you had been terminated from the Police Department? A. Yes, sir.

Q. Incidentally, did you ever apply for the Metropolitan Police in Washington, D. C.? A. Yes, sir, I did.

I forgot about that one.

Q. Did you take the examination there? A. Yes, I did.

[15] Q. Did you pass it? A. Yes.

Q. Did you indicate termination from the Police Department? A. Yes, sir, I did.

Q. Were you ever called? A. No, sir.

Q. Now, let's got into the private sector. Where did you apply for jobs there? A. Well, what I did is, I would look up in the newspaper job availability positions, and I at first tried to get jobs in the security field. I applied for a job with the American Bank Note Company, as a security guard in the South Bronx. I was called in for an interview, and the man had made several remarks about my records.

At that time the Knapp Commission hearings had just ended and he tried to infer that I had been terminated from—

Mr. Herzog: Objection.

The Court: Sustained.

Q. Just tell us what he said, not what he inferred. A. Okay.

The man said that they had no—

Mr. Herzog: I object to what he said.

[16] The Court: He is objecting to it.

Mr. Resnicoff: I thought he was objecting to the inference, not to the conversation.

The Court: He is objecting on the ground of hearsay.

Q. Did you get the position? A. No, sir.

Q. Where else did you apply? A. I applied to various banks near where I live, and some of them downtown here

in Manhattan. I would go and see the bank manager. Some of them gave me a little questionnaire to fill out, and I filled it out. I never heard from any of these banks I went into.

Q. Did you indicate that you had held a prior job with the Police Department and you had been terminated? A. Yes, sir, I did.

Q. What other private industry agencies did you apply for and where did you get a job, if any? A. I went to Bonwit Teller. They had an opening for a store detective. I was interviewed. And they told me they'd call me. They never did. I went to E. J. Korvettes to apply for a security position there, in Scarsdale. I also filled out a questionnaire. I never heard from them.

[17] Then I decided to look elsewhere than the security field. I applied for a job as a bathroom fixture painter. I was turned down for that. I applied for a job as a sound editor, as I had had previous experience in high school in audio visual aids. I was turned down for that job. I applied for a job distributing books in the Bronx area to various businesses. I never heard from that position again.

Any available opening that they had in the want ad section that I thought I could fit into or that looked like a decent job, I tried to apply for.

Q. Did there come a time when you applied for a job with Penn Central? A. Yes, sir.

Q. Penn Central Railroad? A. Yes, sir.

Q. Tell us about it. A. I had heard that the Penn Central Railroad police hire—well, the Penn Central Railroad hires men to be police officers to guard their holdings and property.

And I went down there, and their process is that you put your name down, it's accepted and put on a waiting

list, and when they get to your name they call you down and give you a test. I put my name on the list about [18] March or April of '73, and in August of 1973 I was called down to the Penn Central Police Headquarters in Penn Station and given a battery of competitive intelligence tests.

And out of the 20 people that took the exams, I scored fourth highest in the class, and we were told they would hire five people out of that group.

So I was among the five that was hired on September 10th, 1973.

Q. What kind of work did you do there when you were hired with Penn Central Railroad? A. When I was hired I was sent to the Weehawken Yards, in Weehawken, New Jersey, and I performed preventive patrol there. We checked various cars laden with high-value goods, like television sets, loads of liquor, loads of meat that would come in.

We checked on the trains that passed through the various towns in New Jersey to make sure there was no pilferage and theft. We sealed various cargos with railroad seals. We checked on any emergency condition such as reports of debris lying on the track, children playing on the railroad tracks, and we attempted to keep trespassers off of railroad property.

Q. Did there come a time when your employment [19] was terminated? A. Yes, sir.

Q. When was that and tell us the circumstances. A. That was November 11, 1973. About November 3, 1973, I was performing a 4 to 12 in the South Kearney Truck Train Yard in New Jersey. I had been transferred there after Weehakewn. And I was told that a Lieutenant Hamilton wanted to see me in headquarters.

And when I got to the Penn Central Headquarters in Penn Station, about 1 o'clock at night, there was a letter that was left there for me, and the desk officer there told me I should affix my signature to the letter, that they needed it to continue my character and background investigation.

The letter stated—I don't remember the exact wording—it stated something like: I, Elliott H. Velger, do release my records to the Penn Central Railroad Police, an authorized agent of the Department, and that I don't hold the railroad police or the New York City Police in any liability in any way, and of course I signed it because I was requested to. That was November 2 or 3.

November 11 I was called up—I was scheduled to do a 4 to 12 that day, I was called up by one of the [20] officers there at my residence, about 9 or 12 in the morning, and he told me to bring all my available equipment with me down to headquarters: Shield, identification card, handcuffs, tyden ball seals, any railroad equipment that had been issued to me.

I appeared that morning around 11 o'clock and I spoke to a Captain Steele. And he explained to me that my records in the Police Department—

Mr. Hergoz: Objection.
The Court: Sustained.

Q. Were you retained? A. No, sir. They told me I was going to be terminated.

Q. Did they tell you why you were being terminated?

Mr. Herzog: Objection.
The Court: Sustained.
Mr. Resnicoff: I did want at this point to make

an offer of proof, he knows why they told him he was terminated, Judge.

It is rather important.

The Court: It is hearsay.

Q. Incidentally, how much were you earning at the time of your dismissal from the Police Department? A. The New York City Police?

[21] Yes. A. 11,200 per annum.

Q. So that you were working for the Penn Central for how long a period of time? A. A little over two months.

Q. Was there any question about the quality of the work that you were performing while as a guard at Penn Central? A. Not in the least, sir. I was told that my work was excellent.

Q. Did you attempt to get a gun or was it necessary for you to get a gun? A. If I had successfully passed my probationary period in the Penn Central Railroad Police, I would have been issued a revolver.

Q. What are you doing now? A. I am now a police administrative aide. It is a clerical position with the New York City Police Department.

Q. What does that job pay? A. It pays 8200 per annum.

Q. And this is as a result of an examination? A. Yes, sir.

Q. You are now serving a probationary period? A. Yes, sir.

[22] Q. Did you have a conversation with your sergeant the other day with respect to termination of your employment— A. Yes, sir, I did.

Q. —as a police administrative aide? A. Yes, sir, I did.

Q. And where is this, right at police headquarters across the street? A. No, sir, this was at the Applicant Investigation Section at Old Slip and South Street.

Q. Tell us what the sergeant said to you and what you said to him?

Mr. Herzog: Objection.

The Court: I am going to sustain the objection.

Mr. Resnicoff: This is a sergeant of the Police Department.

The Court: Let's produce him.

Mr. Resnicoff: I don't even know who he is. He is going to terminate him because of what happened.

Mr. Herzog: I object. Are you testifying, Mr. Resnicoff?

Mr. Resnicoff: No.

The Court: You are testifying.

[23] Q. When does this probationary period terminate? A. January 17, 1975.

Q. Have you been told that your services are going to be terminated? A. Yes, sir.

Mr. Herzog: Objection.

The Court: Sustained.

The answer may be struck.

Mr. Resnicoff: I have no further questions.

Cross examination by Mr. Herzog:

Q. Mr. Velger—is that it? A. Yes, sir.

Q. Now, all these Civil Service exams you took with the

Federal Service, State of New York, you are still on those eligible lists? A. Quite a few, yes, sir.

Q. And have you ever been told you are ineligible? A. Have I ever been told?

Q. Have you ever received any notice of ineligibility? A. Yes, sir.

Q. From which agencies and which departments? A. The Taxi and Limousine Commission, I believe.

[24] Q. Did they give you a reason why you were ineligible? A. No, sir.

Q. As regards the Penn Central, I understand you testified that you had consented to them conducting an investigation and asking the Police Department for your record, is that true? A. Yes, sir, it is required.

Q. In other words you signed an authorization? A. Yes, sir.

Q. And without that authorization they couldn't have gotten that record? A. Yes, sir.

Q. Just one other question: With regard to the City of Plainfield, you testified that you applied for a job as a police officer for the City of Plaintifield? A. Yes, sir.

Q. And you didn't get that appointment? A. No, sir.

Q. Did you ever sign an authorization for the Police Department of the City of Plainfield to get a background check or to approve a background check? A. Not for the New York City Police Department. I did for my previous positions.

[25] Q. But you refused to do it for the New York City Police Department? A. Yes, sir, I did.

Q. Were you told by the City of Plainfield that you couldn't get it until they obtained a background check? A. No, sir.

Mr. Herzog: Can I speak to Mr. Resnicoff for just one moment, your Honor?

The Court: Yes.

Mr. Herzog: Would you consent to putting this in or do I call the person from—

(Discussion between Mr. Resnicoff and Mr. Herzog.)

Mr. Resnicoff: Can we approach the bench, Judge?

The Court: Yes.

Mr. Resnicoff: Of the record.

(Discussion off the record.)

Mr. Herzog: I offer this in evidence.

Mr. Resnicoff: I object to it.

A. May I address the Court?

The Court: No, you may not.

Mr. Resnicoff: Objection, if your Honor please.

[26] The Court: I am going to sustain the objection. You will have to produce the witness.

Mr. Herzog: I have no further questions.

Oh, just one thing.

Q. In other words Mr. Velger, you are still on eligible lists, you haven't been declared ineligible for any position except the Taxi position, is that right? A. As far as I know, sir, yes.

Q. Do you know why you were declared ineligible for the Taxi Commission? You said you didn't know why? A. No, they didn't tell me why.

Q. They didn't tell you why you were declared in eligible? A. No.

Q. Were you asked why you were declared ineligible, did you give a notification? A. I got an application in the mail that my application was ineligible.

Q. Can I ask you to produce that notice of disqualification? A. I don't have it with me, sir.

Q. Isn't it a form that is crossed off and tells you where each b[illegible] is— A. It was a punch card, it was an IBM punch card.

[27] Q. An ineligibility you got by punch card? A. Yes, sir.

Q. Are you sure?

Mr. Resnicoff: Not every commission works the same way, Irwin.

Mr. Herzog: It is the same Civil Service Commission.

Eligibility is passed on by the Civil Service Commission.

A. I received a punch card in the mail from the Taxi Limousine Commission. They just—I am not sure what it was. A lot of the exams I applied for, some of my qualifications didn't fit. I took every exam that was possible. It's possible I didn't have the qualification for the position. They just sent me a punch card stating I was ineligible.

Q. Did you ever get a letter from the New York City Civil Service Commission or the New York City Department of Personnel which had a lot of boxes on it where there is check off one block, ineligible for A, B, C, D, E, giving your reasons? A. No, sir, I have taken over a hundred Civil Service exams. I have so many notices. I really don't remember. I received a punch card from them.

[28] Q. Did you ever receive any notice of ineligibility from any exam of the type I explained to you? A. No.

Mr. Herzog: Thank you.

(Witness excused.)

Mr. Resnicoff: Captain Steele.

ROBERT J. STEELE, called as a witness by the plaintiff, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct examination by Mr. Resnicoff:

Q. Captain Steele, you and I met for the first time, is that correct? A. That's correct.

Q. You are under subpoena? A. Yes.

Q. Other than the one telephone conversation that we had, we have never met, is that right? A. That's correct.

Q. Do you know the plaintiff, Mr. Velger here? A. Yes, I do.

Q. Will you tell us the circumstances, how you got to know him? A. Well, after his appointment—

[29] Q. Excuse me. I will withdraw that.

Where are you presently employed? A. Captain of Police, Commanding Officer at Pennsylvania, Station, New York, Penn Central Railroad Station Police.

Q. How long have you been there? A. At Penn Station?

Q. Yes. A. Four years.

Q. Now, my previous question: How did you meet him? How do you know him, Mr. Velger? A. I met him as an applicant at Pennsylvania Station here.

Q. Was he appointed? A. Probationary status, yes.

Q. What kind of work did he do? A. To my knowledge, all good work.

Q. Did there come a time when he was terminated? A. Yes.

Q. Do you know why he was terminated? A. Yes, I do.

Q. Will you please tell his Honor why? A. I was forced by my superior—

Mr. Herzog: I object.

[30] The Court: Sustained.

Q. Do you know of your own knowledge why? A. Yes, I do.

Q. All right, please tell us. A. As a result of the investigation of his background conducted by then lieutenant, now Captain Hamilton Ronny E. Hamilton, that his background investigation with the New York City Police Department wasn't satisfactory due to an incident that had occurred while he was in the New York City Police Department.

Q. Do you know what that incident was? A. Yes, I do.

Q. What was the incident? A. It involved a revolver.

Q. Do you know any further details or you know nothing else about that? A. Very sketchy, that he had put a revolver to his head.

Q. Did they indicate this was with a group of other fellows, horse play or anything like that? Do you know anything about that? A. I understand there were others present.

Q. It was what? I am sorry. A. There were others present at the time.

[31] Q. There were others present? A. Yes.

Q. This was in the Academy, do you recall? A. Yes.

Q. Was that the only reason why he was terminated? A. Yes.

Q. And that was the cause of his termination from the New York City Police Department? A. Yes.

Q. You say other than that his work with Penn Central was quite satisfactory? A. All his personnel evaluation reports were good.

Mr. Resnicoff: You may examine.

Mr. Herzog: I have no—just one question.

Cross examination by Mr. Herzog:

Q. Captain Steele—is it? A. Yes.

Q. —when you obtained the information from the New York City Police Department, Mr. Velger had authorized that in order for you to obtain that information, is that not true? A. I did not obtain it.

[32] Mr. Herzog: I have no questions.

Redirect Examination by Mr. Resnicoff:

Q. But do you know whether Mr. Velger had signed such a form? Such a form is in existence, isn't that right? A. Yes.

Mr. Resnicoff: All right. That is all.
Thank you Captain.

(Witness excused.)

LONNIE HAMILTON, called as a witness by the plaintiff, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct Examination by Mr. Resnicoff:

Q. Where are you presently employed, sir? A. I am presently employed with the Penn Central Railroad Police as night captain, New York and New Jersey.

Q. We meet for the first time? A. Yes, sir.

Q. Did we ever have a telephone conversation before? A. No, sir.

Q. You are here under subpoena, is that correct? [33] A. That's correct, sir.

Q. You have never seen me before? A. No, sir.

Q. All right. How long have you been with the Penn Central? A. Ten years, sir.

Q. Where a man makes an application for employment with Penn Central, particularly where he has been employed as a policemen or fireman of the City of New York, does he fill out a form releasing records, authorizing Penn Station to get his records from the Police Department or from the Fire Department? A. Yes, sir. I require that.

Q. Was such a form filled out by Mr. Velger as the applicant? A. I drew up a letter and had him sign it, yes, sir.

Q. Which authorized Penn Station to get the forms, is that correct, or to get the records from the Police Department? A. Right, sir.

Q. And he signed such a form? A. Yes, sir.

Q. Now, first with respect to the quality of his [34] work, working for Penn Central, was it satisfactory? A. So far as I know it was very good.

Q. Thank you.

Now, did you receive any reports or did you contact the New York City Police Department where Mr. Velger had previously been employed and terminated? A. Yes, sir.

Q. Tell us what you found out? A. Well, I first attempted to contact the New York City Poice Department by letter, and I received a return letter from a Lieutenant Dowd in the personnel department stating—

Q. Excuse me. Dowd? How do you spell that? A. D-o-w-d.

Q. Thank you. A. Stating across the face of the letter, "He worked here until he left."

I then went and visited the New York City Personnel Department, over here in the new police headquarters, and I was advised that I could not see his service record unless he authorized me to do so.

I then went back to the office, typed up a letter of authorization, and left it for Patrolman Velger to sign.

[35] Q. Did he sign it? A. Yes, sir.

Q. Then what did you do with it? A. Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his peronnel record.

Q. You looked through the records? A. Yes, sir.

Q. Tell us what was the reason for the dismissal from the Police Department? A. From the New York City Police Department?

Q. Yes. A. It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.

Q. Other patrolmen? A. Other patrolmen. And supposedly one of the officers reported that Patrolman Velger—

Mr. Herzog: Excuse me. Is this what he said or is this what was in the records?

A. This is what was in the records, sir.

Mr. Herzog: In the records, all right.

A. That patrolman Velger had stuck a service [36] revolver to his head in an apparent attempt to commit suicide.

Q. Did they permit you to make copies of the reports or that was not permitted? A. I did not make copies of the reports. I took notes from the file.

Q. Then you came back and reported that to your superiors or whoever it was? A. No, sir. I then tried to verify it.

Q. You did not try to verify it? A. I tried to verify the information in his service file.

Q. And what happened? A. I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter, and I gave up.

Q. As a police officer were you satisfied with that report? A. No, sir.

Q. They wouldn't permit you to investigate or talk to these other policemen that were involved there, the other probationary partolmen, is that correct? A. No, they wouldn't permit it. I just drew a [37] blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.

Q. Then what happened after that, when you came back to your headquarters? A. After that? I returned to my boss and advised him of my findings, and I told him that under the circumstances I would recommend that Patrolman Velger be terminated.

Q. And he was terminated? A. Yes, sir.

Mr. Resnicoff: You may examine.

Cross examination by Mr. Herzog:

Q. Now, the information you obtained from the Police Department, Lieutenant, was obtained purely by your examination of the records? A. That's correct, sir.

Q. And nobody in the Police Department told you anything? A. No, sir.

Q. In fact when you asked the Police Department to help you they didn't want to help you at all, they didn't tell you anything? [38] A. No, sir.

Q. They didn't give you any information? A. No, sir.

Mr. Herzog: Thank you, that's all.
Mr. Resnicoff: No further questions.
The Court: You are excused.

(Witness excused.)

Mr. Resnicoff: I have nothing further, if your Honor please.

Mr. Herzog: If your Honor please, I move to dismiss the complaint at the end of the plaintiff's case. I think the evidence this morning is clear that if anything happened at all, it is clear the Police Department didn't give out any information about this person. Whatever information came to the Penn Central they obtained themselves under his authorization. As Lieutenant Hamilton just testified, the Police Department didn't tell him anything; they didn't give him anything. They took the complete clam-up attitude. They said, "No, we can't give you this information," and he was quite upset by not getting this information.

Now, Mr. Resnicoff is trying to make out a case that there is a question of stigma here. If there is any stigma, your Honor, it couldn't have come from the [39] defendants here. I respectfully move to dismiss the complaint.

Mr. Resnicoff: If your Honor please, I am really—

Mr. Herzog: Besides I don't think he has made out a case of stigma. Mr. Velger testified he was never declared ineligible from any exam, he is still on eligible lists. The reasons that he was turned down from other employment he didn't know except that he may have not been qualified for other reasons. I have heard no testimony to show that he was stigmatized.

The Court: Mr. Resnicoff?

Mr. Resnicoff: If your Honor please, I am really surprised at the basis for the application made by Mr. Herzog, whom I have known for many years. While it may be, and I don't know, that the Police Department actually didn't send the information to Captain Hamilton, but they made it available and he saw it. But what's more important is the existence of such a report, which in and of itself is a stigma. They speak about five probationary people, with a gun, pointing a gun. That

is a stigma, a serious stigma. And if they claim—and I still don't know what the claim is—if they claim that he is mentally irresponsible or suicidal, I don't know, or [40] homicidal, as Judge Gurfein points out—and I am reading now from the Lombard case—"A charge of mental illness purportedly supported by a finding of an administrative body is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding."

Now, it may very well be that this whole incident was blown out of proportion. You got five rookie cops in the Academy involved in a little horse-play. He has been on the force three years. And they have got this in the file. This young man, if that isn't a stigma, then I don't know what it is.

This is the crux of this case: That they have got it in their records, and he has never been given a chance to contradict or to rebut or even to know what they have got against him. That is a violation of his constitutional rights and that is a denial of due process and the equal protection of laws. That is what this case is about and that is what the Lombard case is and that is Perry against Roth—I mean, Boston College against Roth and Roth and Sinderman cases. That is why this Court has jurisdiction. He is a young man, but he has constitutional rights. He has a life to live. And he can't go through [41] life with this stigma.

Under those circumstances, I say, when your Honor reserves decision, to think about those things. That is what we are talking about in this case, a young man 23 years of age, and they got something in there. If they show it to him, anybody comes in that takes a look at the Police Department, got a paper. That is why he didn't want to sign it for Plainfield. He wasn't getting anywhere. They came in, take a look, they have an incident about a gun. Who is going to hire him. He is dangerous. I don't know whether he is a criminal or he is sick. But to put that label on him the rest of his life Judge, that I don't think is fair and that I think is a violation of his constitutional rights.

And therefore, he should be reinstated and he should be given a full hearing, an adversary hearing. Let's see what happened, which is the only fair thing to do. Thank you, if your Honor please.

Mr. Herzog: If your Honor please, I think what Mr. Resnicoff is trying to say almost sounds ludicrous to me. He is trying to tell us that the Police Department doesn't have a right to investigate its own candidates and make a decision, unless he is given a hearing.

[42] We have been past this question of a hearing, we have had that already and that has been decided. The question here is the question of stigma. So the question is that we have a right. I think it is unquestioned that every agency has a right to investigate the background of its employees who it is hiring, at the time it hires or shortly there-

after during a probationary period and to make a record.

Now he is saying this is a stigma because it is on the record. But did you see, your Honor, what the testimony was in order to get this record? They couldn't—nobody could get the record except with this man's own authorization.

So certainly if there is any stigma, we don't stigmatize anybody. We kept this, this is our record for our business. And unless he wanted us to give it to anybody, it wouldn't have gone to anybody. And this is the testimony before you, your Honor.

Mr. Resnicoff: Judge, if your Honor please, let me just say this, in conclusion: You may have seen the Law Journal of this week. It was a very fine decision by Mr. Justice Arnold Fein, in the State Supreme Court, New York County, I think it was in Wednesday or Thursday's Law Journal.

[43] In that case—I believe I may have a note of it here—in that case Judge Fein, after reviewing the authorities, the Constantino case in the Supreme Court of the United States, Boddie against Connecticut, Roth case, the Boston College case, and the Sinderman cases, the Lombard case, he held, and this is new law and this is going further—he held that a provisional employee, a provisional employee—the decision as I say is in the Law Journal—here is a man who never took an examination, he is appointed off the street, could be a political hack, appointed to a job, and Judge Fein held that it was a violation of his constitutional

rights to dismiss him without giving him a hearing. He didn't indicate what kind of a hearing, but he said he could not be summarily dismissed without a hearing.

Of course, they will say, "Well, we are going to appeal." Of course, when they say Corporation Counsel—

Mr. Herzog: I didn't say that at all.

Mr. Resnicoff: If Corporation Counsel said, "We are going to appeal," the Judge is supposed to genuflect, they are going to appeal. He has gone very far. It is a different ball game today. They are speaking of individual's constitutional rights.

Now, certainly this man—and I am not prepared [44] to say that it is—he has been with this department for three years. And when you terminate a man, a patrolman on a charge of that kind, good God, in all fairness serve him with charges, give him a chance to defend, let's see what happened. Maybe it was just a little horse play with a couple of guys who were just about ready to graduate from the Academy, go out on the street. They were kidding around. Whatever the situation was. We don't know. But to say we don't release—maybe they don't release it, but if anybody comes in and signed by him and they got that, who is going to hire him. And that is what I say, and I am repeating myself, which I don't want to, he doesn't want to sign the other one because if he does he is a dead duck. Who is going to hire him.

He has signed applications for transit police, housing all these other places. He signed releases. They get in touch with New York City Police Department, they send one of their investigators down. They look at this, they come back, there is an incident with a gun, that's it. He is finished.

Under those circumstances, I say, if your Honor please, in chambers, when you think about this case, please think of it in the form of constitutional rights which are involved in this case for this man, whether [45] it is fair to require him to go through the rest of his life with that kind of stigma. And that is a stigma. Thank you, Judge.

The Court: I will listen once more.

Mr. Herzog: Once more. If your Honor please, in regard to the case that Mr. Resnicoff was speaking about, that was cited by Judge Fein, I am familiar with the case. In fact, my recommendation was that we don't appeal it, so I hope you are not disappointed. In that case the man was fired because there was an allegation in the public press that he was fired because he was a thief. In the public press. The newspaper had evidently slipped out through the agency that they fired the guy because he had stolen or something. It is very different from this case. There was no publication to anyone whomsoever except on this one occasion at his own—on his authorization.

We believe this is very different than the case that was decided by Judge Fein. There it was an obvious case. We think it was properly decided. There was a stigma attached. It was in the public

papers, newspapers, the press. This is not the fact here at all.

The Court: I tell you what. I am going to reserve. I will take a short recess. Then I am going to [46] let you go forward with your proof.

Mr. Herzog: If your Honor please, I have to get, if we are going to go forward, I have to get somebody from Plainfield, whom I don't have on hand now, and I have to get one other witness from the New York City Police Department. The Police Department witness I have on telephone call to be here shortly.

The Court: Let's get the Police Department witness. If you have got that letter of authorization out of the file, I am sure that Mr. Resnicoff will agree to let that go in. Let me know when you get your witness.

Mr. Herzog: Yes.

The Court: I am talking about the letter of authorization to look at this file. Have you got that?

Mr. Herzog: Ask him. We will get it. I think he has admitted the letter. I think we have it. I assume we have it.

The Court: I would like to see what the language of it is.

Court will take a short recess.

(Recess.)

Mr. Herzog: I call Mr. O'Brien.

Thomas P. O'Brien—for Defendants—Direct

[47] THOMAS P. O'BRIEN, called as a witness by the defendants, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct examination by Mr. Herzog:

Q. Mr. O'Brien, what's your occupation? A. I am administrative manager with the New York City Police Department, at present assigned to the Personnel Records Division.

Q. What are the duties of that, what duties do you perform? A. We control the Department personnel records of the entire department, both service and civilian personnel.

Q. How long have you been serving in that position? A. At this present area I have been there about six, seven weeks.

Q. Where were you before that? A. Before that I was in charge of the probationary personnel record area.

Q. Which is, very much related to what you are doing now? [48] A. Right.

Q. In regard to probationary records, how long were you in that area, how long have you been in that? A. Seven months.

Q. No, the prior job. A. At the personnel probationary?

Q. Yes. A. I was there for seven months.

Q. And before that? A. I was administrator of the Police Academy for six years—five years, and a year as an assistant administrator.

Q. In regard to records of probationary patrolmen that are terminated, does Police Department have any policy in regard to sending out information as to reasons for termination?

Thomas P. O'Brien—for Defendants—Direct

Mr. Resnicoff: I object to that. Policy doesn't rise to level of law.

Q. What does the police department do with regard to request for information as to termination? A. The request for information as to reason for termination is never given out.

Q. To anybody? A. Other than policy agencies. It has to be a [49] Governmental agency like Park Police, Government Police. If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.

Q. Do they have to have an authorization to obtain that information? A. Not if it is a Government police agency.

Q. How about if it is a non-Government police agency? A. The information is not given to them.

Q. Not given to anyone. A. That's right.

Q. I asked you to look for an authorization in regard to Elliott Velger.

Did you do that before you came here? A. Yes, we checked before we came. It was not in the file in the office. But separated personnel for the period '73, I believe is the date involved, have been transferred to the old record room at 325 Hudson Street.

Q. How long will it take to make that available to this Court? A. It would probably require a search of the record over there. Probably could not be done before [50] tomorrow.

Mr. Herzog: Thank you. I have no further questions.

Mr. Resnicoff: May I have just one moment, Judge, please.

Thomas P. O'Brien—for Defendants—Cross

Cross examination by Mr. Resnicoff:

Q. Mr. O'Brien, just a few questions. Mr. O'Brien, what's your Civil Service title? A. Administrative manager.

Q. That's your civil service title? A. It is, sir.

Q. And you say you work in the unit that takes care of the personnel records of civilians and uniformed as well? A. Yes, sir.

Q. You looked at the records for Mr. Velger, is that correct? A. No, I did not. They are not in my custody at present. They are in the old records room at 325 Hudson Street.

Q. I see. So you are not familiar with his records at all? A. I am not familiar with any records.

[51] Q. All right. So you were here just to offer some testimony on so-called policy, is that right? A. What the department procedure is.

Q. Department procedure. You said something about Government agencies, if they send or request information, you send it along, is that correct? A. We do not send the information to them. They must come to the area, to the office.

Q. In other words, if a man, for example, takes an examination for New York City Transit Patrolman, and he is working as an administrative aide in New York City Police Department, and he indicates employment with the Police Department, and if the New York Transit Police Department requests information as to his records, they don't release information by correspondence, they have to come over to take a look at it? A. Normally, yes.

Q. And that is true for Civil Service Commission, too? A. Civil Service Commission can subpoena the records, direct us to deliver the records in certain areas.

Thomas P. O'Brien—for Defendants—Cross

Q. The Civil Service Commission can subpoena your records? A. Not subpoena them. They direct us to deliver [52] them.

Q. And how about other City agencies? A. Other city agencies?

Q. For example, the New York City Housing Police? A. To be perfectly frank, I haven't seen anyone leave the Department for the New York City Housing Police.

Q. Mr. O'Brien, I didn't ask you that, sir? A. No, the procedure would be, the information would be at there, and they would have to come to us and get it there and not take the records from the unit.

Q. And if I asked you the same question with respect to the Fire Department, you have seen a number of men transfer to Fire Department? A. That's right, yes.

Q. So Fire Department has to come down to look at the records? A. That's right.

Q. How do you consider the Penn Central Railroad? A. As a private agency.

Q. Supposing you received a letter from Penn Central Railroad requesting information on a former patrolman. [53] A. We would release no information except that his title was, when he left, and what his salary was.

Q. But their representative could come down and look at the man's records? A. No, sir, he is not a Government agency.

Q. Would he be able to come down and look at the records? A. That I do not know. I don't believe the records should be made available to him, according to the way it is operated now.

Q. I didn't ask you about now. I am asking you about if you know what the procedure was in '73. That is what we are concerned about particularly with respect to Mr.

Velger. Were you aware of the fact that in '73 Mr. Velger, who had been terminated as a probationary patrolman, had been appointed by the Penn Central Railroad? Had you been aware of that? A. No, I had not.

Q. Had you been aware of the fact that Penn Central Railroad had obtained from Mr. Velger a release authorizings them to inspect his records? Were you aware of that? A. No, I was not.

Q. Were you aware of the fact that a Captain [54] Hamilton of the Penn Central Railroad requested the release of the information in writing and it was rejected or denied by the Police Department? Are you aware of that? A. No, I am not aware of that fact.

Q. Are you aware of the fact that Captain Hamilton was directed by Police Department to come down personally and was shown the records and read the records and made copies of Mr. Velger's reports? Are you familiar with that? A. Not at all, sir.

Q. You know nothing about that? A. No.

Mr. Reniscoff: I have nothing further, Judge.

Mr. Herzog: I have no further questions.

The Court: I have a question.

Mr. O'Brien, in '73, were the rules the same as they are today, do you know?

A. To the best of my knowledge they were, sir.

The Court: In other words, a private agency, according to your procedure, that you know about, personally, would not be able to inspect the records?

The Witness: No, sir.

The Court: You would admit, however, that it [55] is done on a personal basis on occasion?

The Witness: Well, I can't say for what had happened in the past.

The Court: In other words, if I know the sergeant on the desk and I am a police officer from a private agency and I have a release from the person.

The Witness: He would not have access. He would have to—in other words, those records, they would have to come in either to Lieutenant Frank Dowd or myself at present. And prior to filling this position, Sergeant Crotone had it. And this is something that—

Q. How long would he have it? Would he have had it during this period? A. I believe he would, sir.

The Court: February '72 through February '73?

The Witness: I believe if it were '72 it would have been Sergeant Crotone.

The Court: I don't have any other questions, but if I raised questions for you you may ask it.

Mr. Resnicoff: Of course, this witness hasn't answered directly your Honor's question. I appreciate your Honor's question. He hasn't answered the question as to whether or not under those circumstances they could get it.

[56] *By Mr. Resnicoff*:

Q. Are you inferring now that under no circumstances could anybody look at records, see records, where they come in with a release? Is this what you are saying?

A. Is it possible? Anything is possible. Absolutely I don't—

Q. Were you here when Captain Steele and Captain Hamilton testified with respect to having seen reports of the Police Department? A. No, sir.

Q. Who was in charge at that time? A. My predecessor was Sergeant Frank Crotone in this area.

Q. Let me just clear this up, then, in my own mind. You say that if, for example, this man Velger applied for the Yonkers Police Department or the Suffolk Police Department or a Post Office job, how would they get his records? A. They would be directed to come in person o our area.

Q. Oh, A. And identify themselves as a member—

Q. So they could see it, no question about that? A. No, we would screen them. We wouldn't give [57] them everything.

Q. What would you hold back? A. Department hearings in reference to assignments.

Q. But he had no hearing, did he? Mr. Velger had no hearing. A. Then this material wouldn't be in his file.

Q. So that when he comes in, my question to you, with respect to these Suffolk County or Yonkers Police Department, they give them the records, there is no hearing, to look at, is that correct, if he has a release signed by Mr. Velger? A. I would not commit myself whether they would give them the entire record to go through.

Q. They give them part of the record? A. That's right.

Q. Would that part of the record they would show have the reason why he was terminated? A. No.

Q. What would that record have? A. It would have what we call a PA 15, which is the background investigation of the individual for appointment.

Q. The PA 15, Mr. O'Brien, isn't that the application [58] that the candidate himself fills out? A. That's right.

Q. Which I am familiar with and which you know? A. That's right.

Q. That is the application that the man fills out, he fills out for a job after he takes the examination and he fills it out and submits it to the Police Department? A. Right.

Q. I am not talking about the PA 15. This is a record prepared by the applicant himself. I am talking about records of the Police Department concerning the nature of his work, the character, the unsatisfactory— A. No, that part would not be shown to anyone.

Q. Even to another Government agency? A. Evaluation reports I would not show to another agency.

Q. Even to the New York City Transit Police Department? A. That's right. It would be very questionable; I would get a clarification on the authority to give this information.

Q. This is startling to me. Are you trying to tell me, and the Judge, that if the New York City Transit Police Department, a man who has taken an application and [59] has passed an examination in the New York City Transit Police Department, is conducting an investigation of the man, they are going to decide whether to appoint him from the list, and they get in touch with the Police Department of the City of New York, or they come down with their lieutenant or whoever it is comes down, and you or your predecessor or your successor will not exhibit to the representative of the Transit Police— A. I would not do it without authorization from someone of higher authority than myself.

Q. So in other words you have to get authorization and then you show it? A. What they would allow me to show.

Q. All right. And the same procedure is true with respect to private organizations.

You would want to get authorization? A. Private organizations I wouldn't even ask for authorization. It would depend.

Q. But you don't know what happened in '73, the man who was there, what he did? A. No.

Q. You don't know anything about that? A. Not in 1973.

Mr. Resnicoff: I have no further questions.

[60] *Redirect examination by Mr. Herzog*:

Q. When you were asked before about the Yonkers Police Department, Mr. O'Brien, Mr. Resnicoff asked you about the Post Office.

Would that be available to the Post Office? I don't mean the Post Office Police Department; I mean the Post Office. A. The Federal Government? No, sir.

Q. But it would be open to the Post Office Police Department? A. It would be open to the investigator, whoever would do their investigating for them.

Q. In other words the Post Office is not a Governmental Police agency? A. No.

Mr. Herzog: That is all.

The Court: Are these rules and regulations or is this procedure set forth anywhere in writing?

The Witness: No, sir. Not that I have been able to determine.

The Court: Gentlemen?

You are excused, Mr. O'Brien.

(Witness excused.)

[61] Mr. Herzog: Mr. Resnicoff, on this letter?

Mr. Resnicoff: I don't see the relevancy. Let me see that letter again. You are making a mountain out of a mole hill.

I don't want to put the trial over, I don't want to tie the Judge up. No reason to tie myself up.

All right. Rather than, if your Honor please, put the thing over—

Mr. Herzog: We will concede to the entry of the letter from the City of Plainfield, dated September 27, 1974, which was objected to before, and we concede to the entry of a letter sent by the plaintiff to Thomas Trautwein, Patrolman at the Plainfield Police Division, in regard to similar subject matter.

The Court: The one to Trautwein is Plaintiff's 1, and the other one is Defendants' 1.

(Plaintiff's Exhibit 1 received in evidence.)

(Defendant's Exhibit A received in evidence.)

Mr. Herzog: We have no further witnesses, your Honor.

Mr. Resnicoff: Plaintiff rests, if your Honor please.

The Court: With respect to the letter of authorization—

[62] Mr. Herzog: Yes, your Honor.

The Court: —I want you both to stipulate on the record that that will be—

Mr. Herzog: Part of the record.

The Court: —produced and be a part of the record.

Colloquy

Mr. Resnicoff: I have no objection, if your Honor please.

Mr. Herzog: And we will as soon as we can locate it, your Honor, have it delivered to your chambers personally.

The Court: All right.

Mr. Resnicoff: May I suggest that I get a photostatic copy of it.

Mr. Herzog: Yes. As soon as I get it I will Xerox it and send you a copy.

The Court: All right, gentlemen. I will reserve and I will assume that both of you have made all the motions and I will reserve.

Mr. Resnicoff: Thank you very much, Judge.

(Adjourned.)

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2350 (HFW)

ELLIOTT H. VELGER,

Plaintiff,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

HENRY F. WERKER, D. J.

Plaintiff, Elliott H. Velger, has brought this action against the City of New York, the Police Commissioner of the City of New York, the Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham D. Beame as Comptroller of the City of New York, for injunctive and declaratory relief as well

as damages. Asserting jurisdiction under 28 U.S.C. §§ 1331 and 1334(3), (4), 42 U.S.C. §§ 1981 and 1983, and the Fourteenth Amendment, he alleges that after three years with the New York City Police Department as a "police trainee," and six months as a "probationary patrolman," he was discharged without a hearing or statement of charges against him. He asks this court to (a) declare such termination violative of the due process and equal protection clauses of the Fourteenth Amendment, (b) issue a writ of mandamus directing defendants to reinstate him as a patrolman, (c) enjoin defendants from refusing to employ him in the future, and (d) grant him $50,000 in damages.[1] After a trial on the merits, this court finds against plaintiff on all issues.

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[1] He also asks that section 3 of the New York Public Officers Law and section 58 of the New York State Civil Service Law, establishing minimum age limits for certain public officer positions, be declared unconstitutional. For this purpose he requests the convening of a three-judge court. Plaintiff fails to include in his prayer for relief, however, a request that the enforcement of those statutes be enjoined. Under 28 U.S.C. § 2281 a three-judge court is required only when such an injunction is sought. *Astro Cinema Corp., Inc.* v. *Mackell*, 422 F.2d 293, 298 (2d Cir. 1970). *See also* Wright, Federal Courts at 190 (2d ed. 1970).

This court fails to see in any case how plaintiff has standing to challenge those statutes. Section 58, by its own terms, does not apply to the New York City Police Department. Furthermore, plaintiff has made no showing as to either section that he is, or has been, in any way harmed by them. (He likewise has made no offer of proof as to how or why they are unconstitutional.) Plaintiff's eighth cause of action, seeking a declaration of unconstitutionality, must therefore be dismissed.

In an earlier decision on defendants' motion to dismiss for failure to state a claim, District (now Court of Appeals) Judge Murray Gurfein found that as probationary patrolman with no contractual tenure, Mr. Velger had no legitimate expectation of continued employment as a patrolman, and therefore was deprived of no property interest when discharged. *Velger* v. *Cawley*, 366 F. Supp. 874, 877-78 (S.D.N.Y. 1973). In Judge Gurfein's view, the only issue which saved Mr. Velger's case from dismissal was whether in discharging him defendants imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities. *Id.* at 878. In *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Supreme Court ruled that such stigmatization without prior notice and the opportunity for a hearing constitutes deprivation of liberty without due process of law.

In plaintiff's amended complaint the issue of stigma is raised by what he has chosen to call the first, third and sixth "causes of action." As to that issue, the court finds the following facts:

—Plaintiff served in the New York City Police Department as a police trainee from January 31, 1970 to August 15, 1972, a few days after his 21st birthday, when he was appointed a probationary patrolman. Six month later, by letter dated February 8, 1973, the Police Department discharged him. The letter indicated that the Department "has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner."

Opinion of the United States District Court for the Southern District of New York

—After termination plaintiff applied for security officer positions in the private sector, and took civil service examinations for both state and federal government service, passing 97% of them. He was subsequently interviewed for several of the civil service positions, but not recalled. On each application form, where asked to state whether he had ever been dismissed by an employer, plaintiff indicated his Police Department dismissal.

—One of the private sector jobs plaintiff sought was that of security officer with the Penn Central Railroad. After placing fourth in a field of 20 applicants tested, he was hired by the railroad for a probationary period on September 10, 1973. During the probationary period he was asked to sign, and did sign, a release form authorizing Captain Lonnie Hamilton of the Penn Central police to review his New York City Police Department records, and waiving any claims he might have against the Department for allowing Captain Hamilton to see them.

—The Police Department refused to release any information about Mr. Velger to Captain Hamilton by letter. When he phoned, he was informed that only if he were to present the waiver letter in person, in New York, would he be allowed to examine Mr. Velger's file. On doing so Captain Hamilton was given the personnel file, from which he gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suiside attempt.

Opinion of the United States District Court for the Southern District of New York

—Captain Hamilton tried to cerify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In light of his previous failure to obtain information by letter, Captain Hamilton declined to pursue the matter further; he returned to the Penn Central and recommended that Mr. Velger be terminated. This was done on November 11, 1973.

—The unwritten policy of the present administrative manager of Police Department personnel files is that no information whatsoever is released about former employees to any one in the private sector. (No evidence was introduced as to the policy of his predecessor during the time period in issue.) Unwritten policy with respect to government police agencies is that background information on former employees is available to those agencies as a matter of course. Although information as to why an employee was discharged is not formally available to such agencies, it appears to be possible for them to obtain it informally.

It is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants. He has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police record was released

Opinion of the United States District Court for the Southern District of New York

to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof.

As to the other five so called "causes of action" in plaintiff's amended complaint, none merit lengthy discussion. The eighth must be dismissed for lack of standing. *See* n. 1, *supra*. The seventh and fifth fail to state a claim on which relief can be granted. The fourth was previously decided against plaintiff by Judge Gurfein. 366 F. Supp. at 877-78. Lastly, the second does not state a cause of action. *See Koscherak* v. *Schmeller*, 363 F. Supp. 932 (S.D.N.Y. 1973) at 935-36.

Judgment is hereby granted for defendants without costs.

So ordered.

Dated: New York, New York
December 10, 1974

Henry F. Werker
U.S.D.J.

Notice of Appeal

UNITED STATES DISTRICT COURT

Southern District of New York

Civil Action

No. 732350

Elliott H. Velger,

Plaintiff,

—against—

Donald F. Cawley, Police Commissioner, City of New York, Patrick V. Murphy, former Police Commissioner, City of New York, The City of New York, Harry I. Bronstein, Personnel Director and Chairman, New York City Civil Service Commission, and Abraham D. Beame, as Comptroller, City of New York,

Defendants.

Sir:

Please take notice that the plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order and Judgment entered herein on the 10th day of December, 1974, in the Office of the Clerk of the United States District Court for the Southern District of New York, which dismissed the complaint and granted judgment to defendants, and plaintiff appeals

Notice of Appeal

from each and every part of said Order and Judgment, as well as from the whole thereof.

Dated: New York, January 7, 1975.

Yours, etc.,

SAMUEL RESNICOFF, Esq.
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, N.Y. 10007
DIgby 9-3896

To:

ADRIAN P. BURKE, Esq.
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N.Y. 10007

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 912—September Term, 1974.

Argued May 28, 1975 Decided September 9, 1975.)

Docket No. 75-7042

ELLIOTT H. VELGER,

Plaintiff-Appellant,

—against—

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants-Appellees.

Before:

CLARK, *Associate Justice,**
HAYS and MANSFIELD, *Circuit Judges.*

Appeal from an order and judgment entered in the United States District Court for the Southern District of New York, Henry F. Werker, *Judge,* which dismissed the complaint brought pursuant to 42 U.S.C. §1983 and granted judgment for the defendants on all issues.

Reversed.

SAM RESNICOFF, Esq., New York, New York, *for Appellant.*

W. BERNARD RICHLAND, Corporation Counsel, City of New York, New York, *for Appellees.*

CLARK, *Associate Justice*:

In this appeal of his case brought under 42 U.S.C. §1983,[1] Elliott H. Velger, appellant, seeks reversal of a

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* Associate Justice; United States Supreme Court (Ret.) sitting by designaiton.

[1] Title 42 of the United States Code, Section 1983 provides

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects,

(Footnote continued on following page)

judgent refusing: 1) his reinstatement as a probationary patrolman with the New York City Police Department; and 2) the recovery of damages for injury to his reputation because of his summary dismissal. On February 16, 1973, he was dismissed without cause, without a hearing, and without being apprised of the grounds therefor.[2] Velger had enlisted in the force as Patrolman, Police Trainee, on January 30, 1970. He served in that position until August 15, 1972, shortly after his twenty-first birthday, when he was elevated to the position of probationary

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(Footnote continued from preceding page)

> or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

[2] The suit was filed on May 25, 1973, against Donald F. Cawley, Police Commissioner, Patrick Murphy, former Police Commissioner, Harry I. Bronstein, Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham Beame, as Comptroller, City of New York, and the City of New York. The appellant originally sought a mandamus requiring the defendants to reinstate him and an order empanelling a three-judge court to test the constitutionality of Section 63 of the New York Civil Service Law. Section 63 mandates probationary periods for New York civil servants and was the authority for the regular one year probationary Velger was serving when he was dismissed.

The district court held the claim as well as the request for a three-judge court to be "frivolous" under this Court's ruling in *Rusell* v. *Hodges,* 470 F.2d 212 (2d Cir. 1972). See *Velger* v. *Cawley,* 366 F. Supp. 874 (S.D.N.Y. 1973).

Patrolman. He remained in this position until his abrupt dismissal. He had served three years and had only five more months to serve on his probationary period.

While prosecuting his suit, Velger sought other employment. On September 10, 1973, he was provisionally employed by the Penn Central Railroad as a patrolman-watchman. He had placed fourth out of twenty applicants in competitive testing for the position. But after some sixty days with the Penn Central, he was discharged solely because of the results of an inspection of his personnel record in the New York City Police Department. He had granted Penn Central authorization to see his records on file at the Department. The trial judge found that Penn Central "gleaned" from Velger's personnel file that he had [sic] "had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt.[3]

Velger's subsequent attempts to secure work included taking over one hundred civil service examinations, of which he passed ninety-seven per cent and scored many high marks. There is every indication that he would have been successful but for the allegation in his New York

[3] Velger was not made aware of the accusation. In his brief, he says:

> Since the alleged incident occurred at the Police Academy and 'four or five individuals' were involved appellant should have been given an opportunity to explain. It might all have been a little horseplay . . .

City Police Department file.[4] In the private sector, he applied for numerous positions,[5] but was ultimately refused employment; again his personnel file seems to have prevented his employment.[6]

The trial court dismissed the complaint in two stages: first, by holding that Velger's status was probationary and hence he had no property right in the position, and, second, by finding that he had failed to meet his burden of proof that a stigma had attached because of his discharge. Judgment was entered for the City of New York and its officials on all issues. We do not agree. We find it unnecessary to decide whether Velger had a property right in his position and we do not reach that point. We do, however, find that stigma attached because of his dismissal and that he was, therefore, entitled to a hear-

[4] A typical example was the Plainfield, New Jersey, Police Department. It told Velger that his hiring date would be three weeks from the receipt of its notification unless a character investigation required that he be turned down. He was notified but then never hired. Other police positions included: the police departments of Yonkers, N.Y., Jersey City, N.J., and Washington, D.C.; the Triborough Bridge Authority; the Executive Protective Service; Suffolk County Police; and others.

[5] Among the companies to which Velger applied for security police positions were American Bank Note Company, Bonwit-Teller, several Manhattan banks, and the Penn Central Railroad.

[6] Ironically, at the time of trial Velger was employed on a probationary basis in a clerical position with the New York City Police Department. That job, too, was terminated at the expiration of the probationary period on January 17, 1975.

ing to confront the allegations placed in his personnel file. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972).

1. *The Nature of the Charge on which Dismissal was Predicated:*

It stands to reason that any charge that justifies dismissal is a most serious one. Here the exact language of the charge is not known,[7] but it appears to state that Velger "while still a trainee . . . had put a revlover to his head in an apparent suicide attempt." Such a charge suggests to most of us such severe mental illness that it deprives one of the capacity to do any job well. It thus differs from the usual derogatory charge that is leveled at the capacity to do a specific job. Certainly, no more serious charge could be levelled at a police officer.

Moreover, the "rookie" officer has the greater hazard because he has none of the job protection guarantees that a seasoned officer enjoys. Ordinarily, he can be severed from the force without any notice of charges or a hearing being afforded him. Police authorities must, therefore, exercise the greatest degree of care in dealing with probationary officers to make certain not only that their discharge decisions are just but also that their reasons are kept confidential. Here New York City admits that it grants ready access to its confidential personnel files to all governmental police agencies. In a case like the present one this could have the effect of closing the public sector to the probationary police dischargee and depriving him of employment in the largest and most desirable segment of his profession. The same result, in reality, is true in the private sector because New York City answers all inquiries for permission to see personnel files with the suggestion that inspection will be permitted with the consent of the dischargee. The dischargee is then placed "between the devil and the deep blue sea"; he loses whatever his choice. Who would employ an applicant who refused to give authorization? Who would employ one who gives authorization but whose file suggests that he made an "attempt" at suicide?

[7] Appellees resisted all efforts to obtain from them an explanation for the dismissal. Their response to Velger's formal interrogatories prior to trial included the claim that as a probationary patrolman he had no right to a statement of reasons for his termination. The testimony of the Penn Central officer, who investigated Velger's personnel file about the apparent suicide attempt report, was that the attempt incident was the reason for the dismissal. No other explanation was ever offered. Indeed, appellees resisted Penn Central's attempts to verify the report.

2. *The Requirements of Procedural Due Process:*

In light of the rationale behind both *Board of Regents* v. *Roth,* supra, and *Perry* v. *Sinderman,* supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee. Perhaps the discharge of a police officer is stigmatization *per se.* But

we need not announce such a "brass collar" rule, for here the record reeks of the stigma that attached to Velger. The stigma foreclosed employment in both the public and private sectors. First, the manner in which personnel records are made available to inquiring public and private employers insures that serious derogatory information in the file will stigmatize the dischargee. Second, the lax procedures in the practice of the New York City Police Department, as it discharges probationary officers without a statement of reasons or hearing, encourage the very harm that *Roth* and *Perry* urged be prevented. Here, from what little is known, Velger's accusers are not named and his actions are not described in any detail. The framework in which the alleged suicide attempt occurred included the presence of five fellow trainees, but no explanation exists for such an unlikely audience to an attempted suicide. No date or hour for the incident is specified, although it allegedly occurred while Velger was a trainee. His appointment to patrolman was seven months old and he had been with the force three years before the discharge action, supposedly based upon the earlier incident, was taken.

As this Court so well stated in *Lombard* v. *The Board of Education of the City of New York,* 502 F.2d 631 (1974):

> A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has not opportunity to meet the charge by confrontation in an adversary proceeding. *Id.* at 637-8.

3. *The Remedy*:

We, therefore, hold that the findings of the trial court that no proof of stigma was made are clearly erroneous. This result need not have any material impact upon the practice of not affording a hearing to probationary dischargees. The appellees could change their disclosure procedures to prevent the dissemination of derogatory and possibly stigmatizing allegations unless notice of the charges and a hearing are first afforded to the dischargee. Otherwise, rudimentary procedural due process requires that such notice of charges and a hearing be afforded before a dismissal can be effective. Reversed.

75-812

Supreme Court, U.S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

against

ELLIOTT H. VELGER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

- against -

ELLIOTT H. VELGER,

Respondent.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

The luminous decision by Associate Justice CLARK, United States Supreme Court (Ret.) sitting by designation and concurred in by HAYS and

MANSFIELD, Circuit Judges, did not set forth any new principles of law. Eo converso, the Court merely applied the reasoning in BOARD OF REGENTS v. ROTH, 408 U.S. 564; PERRY v. SINDERMAN, 408 U.S. 593, and LOMBARD v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, 502 F. 2d 631 (1974), cert. denied March 17, 1975 (74-941), 420 U.S. 976. Significantly, petitioners brief made no reference to the LOMBARD case and no attempt was made by them to distinguish same. Any such attempt would have been abortive.

The conclusory statement by petitioners that the decision of the United States Court of Appeals for the Second Circuit "represents an unwarranted departure from this Court's comprehensive ruling in BOARD OF REGENTS v. ROTH" ***, is utterly devoid of any merit. In this connection, Mr. Justice CLARK held:

> "In light of the rationale behind both BOARD OF REGENTS v. ROTH,

> supra, and PERRY v. SINDERMAN, supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee.***".

It is quite obvious, therefore, that the Court below merely applied the principles of law established by this Honorable Court in the ROTH and SINDERMAN cases. There was no departure or deviation.

THE FACTS

Prior to January 30, 1970, the New York City Civil Service Commission advertised an open written competitive examination for the position of PATROLMEN, POLICE TRAINEE, Police Department, City of New York. The Civil service announcement provided as follows

(pp. 22a,48a-49a):

> "This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Traineee (Police Department) depending on age.
>
> Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

Respondent successfully passed the written examination and the medical and physical tests. Before he was placed on the eligible list, the Civil Service Commission as required by law investigated respondent's background, school records, employment records, etc., and having found respondent eligible, certified his name as qualified for appointment. The Police Department then conducted its own investigation.

On January 30, 1970, respondent was appointed from the eligible list to the position of Police Trainee (pp.91a, 48a-49a).

On August 8, 1972, respondent became twenty-one years of age (49a,91a). On August 15, 1972, respondent was promoted to the position of Patrolman.

On February 16, 1973 with more than three years of continuous service with the Police Department, City of New York, without stated charges and without a hearing, respondent received the following written notice (10a):

> "You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

An action was then instituted in this court. In his demand for interrogatories (78a), respondent requested the following information:

> "Set forth all the reasons why the Police Department terminated plaintiff on February 16, 1973, inasmuch as plaintiff was continuously employed by the Police Department since January 31, 1970".

In their reply (80a), petitioners stated:

> "This interrogatory is objectionable in that plaintiffwas employed as a probationary patrolman at the time of his termination and hence has no right to a statement of reasons for his termination".***

In response to defendants interrogatories, respondent set forth at length all of the government, state, and city civil service examinations which he took and passed (72a-75a). In his affidavit (40a-44a), respondent set forth in detail his inability to obtain employment in government and in the private sector because of his dismissal from the Police Department. Respondent stated as follows (42a-43a):

> "I was terminated by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process".

At the trial in the District Court before Judge WERKER, respondent in detail set forth his inability to obtain employment because of his summary dismissal from the Police Department. Appended herewith is a letter from the City of Plainfield Police Department, New Jersey. Associate Justice CLARK in commenting on respondent's

inability to obtain employment, stated (A6):

> "Velger's subsequent attempts to secure work included taking over one hundred civil service examinations, of which he passed ninety-seven per cent and scored many high marks. There is every indication that he would have been successful but for the allegations in his New York City Police Department file. In the private sector, he applied for numerous positions, but was ultimately refused employment; again his personnel file seems to have prevented his employment".

THE TRIAL

At the trial in the District Court, petitioners produced a Mr. O'BRIEN who was employed as the administrative manager with the New York City Police Department "at present assigned to the Personnel Records Division" (129a). On direct examination, the following testimony was elicited (130a-131a):

"Q What does the police department do with regard to request for information as to termination?

A The request for information as to reason for termination is never given out.

Q To anybody?

A Other than policy agencies. It has to be a Governmental agency like Park Police, Government Police. If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.

Q Do they have to have an authorization to obtain that information?

A Not if it is a Government police agency.

Q How about if it is a non-Government police agency?

A The information is not given to them .

Q Not given to anyone.

A That's right."

This testimony is extremely significant in view of respondent's testimony that he took over a hundred civil service examinations (109a), and passed the examinations "many of them with high marks" (96a).

Although petitioners witness O'Brien testified that termination records of Police candidates were not made available and were not given to non-Government police agencies, his testimony was not true. To put it mildly, the witness O'BRIEN was "mistaken". The fact is that respondents records and the derogatory matters contained therein were made available to Penn Central Railroad Station a non-Government agency.

ROBERT J. STEELE called as a witness by respondent, testified he was the Captain of Police, Commanding Officer at Pennsylvania Station, New York, Penn Central Railroad Station Police (111a), and that respondent was terminated because of the

report submitted by LT. LONNIE. HAMILTON (now Captain) of his Staff who inspected and reviewed the Police Department files relating to respondent's termination. The witness further testified that respondent's "personnel evaluation reports were good" (113a).

LONNIE HAMILTON employed as a night Captain with the Penn Central Railroad Police testified that respondent filled out a form which authorized the witness to get his records at the Police Department (115a), and further testified (115a-116a):

> "Q Now, first with respect to the quality of his work, working for Penn Central, was it satisfactory?
>
> A So far as I know it was very good."

On the very crucial issue as to the contents of the Police Department records pertaining to respondent's dismissal, Captain HAMILTON testified (117a-119a):

"Q Did he sign it?

A Yes, sir.

Q Then what did you do with it?

A Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his personnel record.

Q You looked through the records?

A Yes, sir.

Q Tell us what was the reason for the dismissal from the Police Department?

A From the New York City Police Department?

Q Yes.

A It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.

Q Other patrolmen?

A Other patrolmen. And supposedly one of the officers reported that Patrolman Velger--

MR. HERZOG: Excuse me. Is this what he said or is this what was in the records?

MR. RESNICOFF: What was in records.

A This is what was in the records, sir.

MR. HERZOG: In the records, all right.

A That patrolman Velger had stuck a service revolver to his head in an apparent attempt to commit suicide.

Q Did they permit you to make copies of the reports or that was not permitted?

A I did not make copies of the reports. I took notes from the file.

Q Then you came back and reported that to your superiors or whoever it was?

A No,sir. I then tried to verify it.

Q You did not try to verify it?

A I tried to verify the information in his service file.

Q And what happened?

A I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter, and I gave up.

Q As a police officer were you satisfied with that report?

A No, sir.

Q They wouldn't permit you to investigate or talk to these other policemen that were involved there, the other probationary patrolmen, is that correct?

A No, they wouldn't permit it. I just drew a blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.

Q Then what happened after that, when you came back to your headquarters?

A After that? I returned to my boss and advised him of my findings, and I told him that under the circumstances I would recommed that Patrolman Velger be terminated.

Q And he was terminated?

A Yes, sir.

MR. RESNICOFF: You may examine."

After looking at the Police Department records, Captain HAMILTON had no choice but to recommed respondent's termination.

POINT I.

NOTHING IN THE OPINION BY THE COURT OF APPEALS WAS CONTRARY TO THE ROTH, SINDERMAN AND THE LOMBARD DECISIONS. THE SUMMARY DISMISSAL OF RESPONDENT WITH MORE THAN THREE YEARS OF CONTINUOUS SERVICE WITH THE POLICE DEPARTMENT, CITY OF NEW YORK, WITHOUT STATED CHARGES AND WITHOUT A HEARING, WAS IN VIOLATION OF HIS PROCEDURAL AND SUBSTANTIVE RIGHTS TO DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

In the notice of termination (10a), petitioners advised respondent he was not being retained because "your capacity having been unsatisfactory to the Police Commissioner." During the course of the oral argument, counsel for petitioners admitted that the reason set forth in the notice was not true. Counsel further conceded if petitioners had set forth in said

Notice that respondent had been terminated because he put his gun to his head in an apparent suicide attempt, it would have been a stigma.

On page 9 of their petition, the statement is made "the plaintiff never denied that he put a gun to his head." That statement of course, is not true. In his affidavit (42a-43a), respondent stated:

> "***I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file.***"

Appellant is twenty-three years of age, single, and resides with his parents (90a). He commenced employment as a Police Trainee on January 30, 1970. His employment with the Police Department was continuous until his summary dismissal on February 16, 1973, which was accomplished without charges and without a hearing (92a).

In LOMBARD v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, 502 F. 2d 631,

Judge GURFEIN, writing for the U.S. Court of Appeals, Second Circuit, in reversing TRAVIA, J. (E.D.N.Y.) held:

> "The distinction taken by this Court in ROTH is that where the appellant's 'good name, reputation, honor, or integrity is at stake' or 'the State, in declining to re-employ (the respondent), imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,' 408 U.S. at 573, he may claim a deprivation of 'liberty' under the due process clause of the fourteenth amendment. A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding. Cf. BIRNBAUM v. TRUSSELL, 371 F. 2d 672 (2d Cir. 1966) (accusation of racial bias)." (emphasis supplied).

Where an adverse action is taken which generates a deprival of an individual's rights to due process and the equal protection of the laws, such adverse action is unconstitutional. Any adverse action which seriously affects property rights must be fundamentally fair and rational. It may not be unduly oppressive, unreasonable and in derogation of one's rights to earn a living. Fairness is an element of due process.

The due process clause requires notice and an opportunity to be heard. The constitutional guarantee of procedural due process attaches when there is a governmental deprivation of a legitimate property interest. Once this threshold has been crosssed,the opportunity to be heard is constitutionally mandated (see, eg.

Fuentes v. Shevin, 407 U.S. 67; Bell v. Burson, 402 U.S. 535; Wisconsin v. Constantineau, 400 U.S. 433; Goldberg v. Kelly, 397 U.S. 254; Sniadach v. Family Finance Corp., 395 U.S. 337).

Respondent was dismissed from his position of "probationary" Patrolman (10a). Since respondent was a Patrolman, his dismissal gave rise to a stigma of criminality.

Tenure, status, deprivation of a position and wages affect liberty and are property. A Patrolman is a Peace Officer and a Law Enforcement Officer. Dismissal from such a position is a stigma- a disability that will affect the individual's freedom to take advantage of other employment opportunities (Cornell v. Higgenbotham, 403 U.S. 207, 208), and therefore clearly

permits appellant to invoke the panoply of due process procedural protection. Although due process tolerates variances in the form of a hearing (Mullane v. Central Hanover, 339 U.S. 306, and Boddie v. Connecticut, 401 U.S. 371), opportunity for that hearing must be provided before the deprivation at issue takes effect (Bell v. Burson, 402 U.S. 535; Wisconsin v. Constantineau, 400 U.S. 433; Armstrong v. Manzo, 380 U.S. 545 and Burton v. Wilmington Parking Authority, 365 U.S. at p. 726).

The mere existence of the adverse, derogatory and stigmatic report which was available for inspection and review by prospective employers and agencies, operated to the immediate prejudice, damage and detriment of respondent and prevented him from earning a livelihood and securing

comparable employment. What Government law enforcement agency requiring the incumbent to carry a firearm would hire or appoint respondent under the circumstances disclosed? What Government agency would hire respondent in any responsible position? The accusation that a young male twenty-three years of age has suicidal tendencies is a serious charge. It betokens a mental aberrancy. Such an individual is ill and would in all probability erupt under tension, stress and anxiety.

Respondent, a young man twenty-three years of age, should not be compelled to go through the rest of his life carrying the stigma of a suicidal individual.

The decision by Associate Justice CLARK had heart, compassion and understanding. It was a sound legal exposition by a distinguished Judge who displayed an astute perception into the

principles of law enunciated by this Honorable Court in the ROTH and SINDERMAN cases, supra, and LOMBARD v. BOARD OF EDUCATION, supra. The unanimous decision by the SECOND CIRCUIT COURT OF APPEALS was neither a departure nor a deviation from this Court's rulings. There is neither need nor necessity for a review by this Honorable Court.

C O N C L U S I O N

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

DATED: December 19, 1975.

Respectfully submitted,

SAMUEL RESNICOFF, Esq.,
Attorney for Respondent.

LETTER FROM THE CITY OF PLAINFIELD, NEW JERSEY, POLICE DEPARTMENT

CITY OF PLAINFIELD
NEW JERSEY

POLICE DIVISION

200 East Fourth Street
(201) 753-3039

June 6, 1974

Mr. Elliott H. Velger
1855 Kennedy Boulevard
Jersey City, N. J. 07305

Dear Mr. Velger:

You were recently notified by the New Jersey Civil Service Commission that you were certified for a position with the Plainfield Police Division. This is a formality by which Civil Service purges their list of eligible candidates of those who for various reasons have been rejected by this and other agencies.

The Plainfield Police Division has notified the Civil Service of our rejection of your candidacy for the position of Police Officer with this Division. Our commitment in this matter has not changed. We do however, thank you for your interest in the Plainfield Police Division and wish you success in your future endeavors.

Very truly yours,

Thomas Trautwein
Police Officer
Administrative Bureau

TT/ao

(42362)

Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-812

MICHAEL J. CODD, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

—v.—

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-812

MICHAEL J. CODD, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

—v.—

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

Opinions Below

The opinion of the Court of Appeals (117a-125a)* is reported at 525 F.2d 334. The opinion and judgment of the United States District Court for the Southern District of New York (Werker, J.) (109a-114a) granting judgment to the defendants is not officially reported. An earlier opinion of the District Court (Gurfein, J.) (32a-40a), denying motions to convene a three judge court and to dismiss the complaint, is reported at 366 F. Supp. 874.

Jurisdiction

The judgment of the Court of Appeals was entered September 9, 1975 (117a). The petition for a writ of certiorari was filed December 6, 1975, and was granted on June 28, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Is a public employer, in particular, a police agency, constitutionally required to afford a probationary employee a hearing prior to termination where there is derogatory and possibly stigmatizing material in his personnel file which will be revealed to a prospective employer only with the written permission of the employee?

2. Where it is undisputed that a probationary policeman put a gun to his head while in training, must he be ordered reinstated merely because the incident was revealed to a prospective employer and prior to his termination he did not receive a hearing?

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* Numbers in parentheses followed by "a" refer to pages of the Appendix filed with this Court.

Statement

This is a civil rights action brought pursuant to 42 U.S.C. §1983. The plaintiff (here respondent), Elliott H. Velger, was appointed as a New York City probationary patrolman on August 15, 1972 (49a). The Police Commissioner, having found his performance unsatisfactory, ordered his services terminated effective February 16, 1973 (50a). In accordance with standard procedures as to probationary employees, plaintiff did not receive a hearing prior to dismissal nor was he apprised of the reasons for his termination (13a, 50a).

On May 25, 1973, plaintiff commenced this action in the United States District Court for the Southern District of New York to have his dismissal vacated and annulled, to enjoin the defendants from refusing to employ him and for damages caused by injury to his reputation (5a-15a). Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (16a-17a).

In July, 1973, plaintiff moved for an order convening a three-judge court to declare section 63 of the New York State Civil Service Law, which mandates probationary periods for employees, unconstitutional (2a). Judge Gurfein denied the motion to convene a three-judge court on the grounds that substantial questions of constitutionality were not included in the complaint and because the Court of Appeals for the Second Circuit, in *Russell* v. *Hodges*, 470 F. 2d 212, 218 n. 6 (1972), had already decided that such a contention was "frivolous" (36a). He determined that plaintiff, as a probationary employee, had no property interest in not being terminated such as would require a hearing (37a-38a). However, he permitted the filing of further affidavits and the amendment

of the complaint to incorporate the plaintiff's new charge that he had been denied employment opportunities because of derogatory material in his personnel file which he had never seen or been allowed to refute (39a-40a). Thereafter, on March 13, 1974, plaintiff filed an amended complaint (3a, 46a-56a).

On November 25, 1974, a hearing was held before Judge Werker on the issue of whether the plaintiff had been stigmatized and foreclosed from employment opportunities because of the personnel file compiled by the Police Department (64a-108a). The hearing disclosed, and the District Court found (112a), that the plaintiff had been terminated from a job as a Penn Central security officer after a Penn Central captain, with the plaintiff's authorization, saw his New York City Police Department personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt.* There was also evidence that petitioner had unsuccessfully sought security officer positions in the private sector and had taken and passed civil service examinations for the position of police officer, but had not been appointed. However, no proof was submitted that in fact other prospective employers had examined plaintiff's file.

The District Court concluded that the plaintiff (113a-114a):

> "has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information in his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof."

* The plaintiff has never denied that he put a gun to his head. All that he claimed in his brief to the Court of Appeals (p. 16) was that he should have been permitted to "explain" the "alleged incident": "It might all have been a mistake. It could also have been a little horseplay."

The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the plaintiff had not proved stigma (125a) and found that "the manner in which personnel records are made available to inquiring public and private employers insures that serious derogatory information in the file will stigmatize the dischargee" (124a). The Court refused to attach any significance to the Department's requirement that Penn Central, a private employer, present written authorization from the plaintiff before it would release his personnel files, on the ground that, if authorization were refused, the applicant would be denied employment (123a).*

* We annexed to our brief in the Court of Appeals the text of a directive from Police Commissioner Michael J. Codd, dated April 2, 1975, which states that: "In any case where a probationary employee of this Department is terminated, access to his personnel file by any prospective employer, private or governmental, will be granted only upon the probationary employee executing a written authorization for such prospective employer to inspect his file."

ARGUMENT

There was no public disclosure of the reason for plaintiff's discharge at the time he was terminated. Accordingly, he was not unlawfully deprived of liberty by being discharged without a hearing. Furthermore, he does not deny having committed the act for which he was discharged, and, on this ground as well, no hearing should have been ordered.

(1)

In *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), this Court set forth guidelines for determining when a public employee is entitled to a trial-type hearing prior to termination of his employment. It held that procedural due process applies only when the interest in continued employment is within the Fourteenth Amendment's protection of liberty and property.

More recently, this Court has held that there was no deprivation of liberty where a public employee, a police officer, whose position was terminable at will was discharged without a hearing, but there was "no public disclosure of the reasons for the discharge." *Bishop* v. *Wood,* —— U.S. ——, 96 S. Ct. 2074, 2079 (1976).

In the case at bar, there was no "public disclosure" of the reasons for plaintiff's discharge. Indeed, no reason at all was given to plaintiff or anyone else, and access to his personnel file was allowed only pursuant to his express written authorization, and under circumstances where, even absent such authorization, the common law has long recognized a qualified privilege (see PROSSER, Law of Torts [4th Ed. 1971], pp. 789-792). Cf. *Bishop* v. *Wood, supra,* 96 S. Ct., at 2079-2080. No effort was made by the Police Department to blacklist plaintiff or to circulate

derogatory information about him. On the contrary, here, by virtue of plaintiff's execution of an authorization allowing officials of Penn Central to examine his file, it was he, not the Police Department, who was responsible for "publication" of this material. Moreover, this publication did not take place "until after [plaintiff] had suffered the injury for which he seek redress." *Bishop* v. *Wood, supra,* 96 S. Ct. at 2079.

Clearly, there was here no widespread dissemination of derogatory information which "might seriously damage [plaintiff's] standing and associations in his community . . ." *Board of Regents* v. *Roth, supra,* 408 U.S. at 573. And, while it is true such a limited publication made to a new or prospective employer following discharge might well affect the discharged employee's ability to keep or gain new employment, it is significant in terms of the *Roth* analysis that here the alleged defamation did not "occur in the course of the termination of employment." *Paul* v. *Davis,* —— U.S. ——, 96 S. Ct. 1155, 1165 (1976). Accordingly, it should not be held "to provide retroactive support for his claim." *Bishop* v. *Wood, supra,* 96 S. Ct., at 2079-2080.

Just as *Bishop* v. *Wood* indicated (*id.,* p. 2080) that "forthright and truthful communication" between employers and employees and between litigants should not be penalized, so also forthright and truthful communication between past and present or prospective employers should not be penalized. Surely, it should not be penalized in the case of sensitive areas of government such as the police and other investigative agencies.

(2)

Under the ruling of the court below, even where a former probationary employee executes a written release authorizing a prospective employer to see his personnel file, the Police Department must not allow the file to be released if the former probationary employee had not been given a hearing on stated charges prior to his termination. New York State law does not require such a hearing for termination of probationary employees (see *Talamo* v. *Murphy*, 38 NY 2d 637, 345 N.E. 2d 546 [1976]), and both *Roth* and *Bishop* v. *Wood* make clear that under the Constitution a public employer ordinarily has the right to terminate, without a hearing, employees who do not have State law tenure rights or contract rights in continued employment. Nonetheless, the practical result of the Court of Appeals' decision here is to require that public employers afford all their employees (probationers, provisionals, and those exempt from the civil service rules, as well as tenured civil servants) a hearing on stated charges prior to termination, or else be precluded from disclosing information about former non-tenured employees even where the former employees desire and authorize such disclosure. This can have only untoward consequences.

By way of illustration, we ask the Court to consider the situation of a Justice of this Court, with a confidential clerk who has no property interest in his job and who proves unsatisfactory because, for example, the Justice believes the clerk has disclosed the Court's decision on a still pending case. The Justice decides to terminate the clerk. He must then decide whether to hold a full-scale hearing on stated charges, for, if he does not, should his former clerk apply for a position with another judge, he will be barred from revealing anything whatever about the former clerk's behavior; indeed, he might even be

barred from refusing to respond to such inquiries. This would be so even if the fact of the disclosure was undisputed. We submit that *Roth* does not require such a result and should not be so extended.

Moreover, the decision below is especially unfortunate in its application to a police agency. To require the New York City Police Department to withhold information about a former employee from other police agencies who are considering hiring him, arming him and assigning him to the sensitive tasks of a police officer, where that former employee has himself authorized disclosure, imposes an undue restriction on the Department in the fulfillment of its obligations to the public. Here, the former employee does not deny that while a trainee he put a gun to his head; and there can be no doubt that such an act is a constitutional basis for termination of his probationary employment. The Department should not be barred from disclosing its files to other police agencies with the former employee's permission.

The rule which we urge here is not inconsistent with this Court's decision in *Roth*. It does not allow unfettered freedom to publish derogatory information about former employees—in the case of excessive publication of such information or publication for malicious reasons, the former employee would have available to him his state law remedies for defamation. Cf. *Bishop* v. *Wood, supra,* 96 S.Ct., at 2080; *Paul* v. *Davis, supra,* 96 S.Ct., at 1165-1166.

Rather, under the rule which we urge all that would be allowed would be very limited disclosure pursuant to express authorization by the former employee. On balance, we submit, this adequately protects the interests sought to be protected by *Roth* and at the same time protects the interests of public employees and society in general.

(3)

The State of New York has pioneered in civil service reform. The requirement of appointment on the basis of merit and fitness is embodied in the State Constitution (Article 5, §6), and has been there since 1894 (Constitution of 1894, Article 5, §9 [See Historical Note, McKinney's Consol. Laws of New York, Constitution, Article 5, §6 Book 2 (1969), p. 200]). Once tenured, a civil servant in New York enjoys strong job protection (see Civil Service Law, §75), and, in the case of tenured police officers, proceedings to remove such employees for misconduct have been analogized by the New York courts to criminal proceedings (see *Evans* v. *Monaghan*, 306 N.Y. 312, 319-320, 118 N.E. 2d 452, 455 [1954]). See also Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees," 124 U. of Pa. L. Rev. 942, 944-946, 1008-1010 (1976) (discussing generally the problems, from a government management standpoint, involved in removing unfit employees and restricting tenure protection to the truly qualified).

Not only is it difficult to terminate an unsuitable officer once he is granted tenure, but also such an officer poses a direct threat to himself as well as others, and, for failure to terminate such an officer, the City may itself be cast in liability for injuries to others. See, *e.g.*, *McCrink* v. *City of New York*, 296 N.Y. 99, 71 N.E. 2d 419 (1947).

Under these circumstances, the responsibility of the Commissioner in deciding whether to retain or terminate a probationary police officer is, if not awesome, at least most grave. Quite appropriately, New York law places broad discretion in the appointing officer in this regard (see *Talamo* v. *Murphy*, *supra*). Such discretion should not be inhibited by requiring a pretermination hearing where termination is not accompanied by public disclosure of stigmatizing material.

Similarly, for very much the same reasons, post-termination disclosure to other security agencies of the reasons for termination should not be barred, especially where the discharged employee has himself authorized such disclosure.

(4)

Finally, we would note that in this case the requirement of a hearing makes no sense at all, for plaintiff does not deny that he committed the act for which he was fired. Instead, he as much as admits that he put a gun to his head, but urges that this might have been horseplay or the like (92a, 95a). Whatever the reason for such conduct, surely a police department does not have to tolerate it in its employees. In the case of a tenured employee, this would constitute a fully sufficient ground for dismissal following a hearing; in the case of an employee terminable at will, no hearing at all should be required where such conduct is admitted. If the injury complained of here is properly to be viewed as a species of defamation, certainly admitted truth should be accepted as a complete defense to the complaint.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the complaint ordered dismissed.

September 3, 1976

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel of the City of New York,
Attorney for Petitioner.

L. Kevin Sheridan,
of Counsel.

Supreme Court, U. S.
FILED
OCT 1 1976
MICHAEL RODAK, JR., CLERK

To be argued by
SAM RESNICOFF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

against

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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Attorneys for Respondent.

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Supreme Court of the United States

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No. 75-812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

against

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

Preliminary Statement

In *Lombard* v. *The Board of Education*, 502 F. 2d 631, cert. denied March 17, 1975, 420 U.S. 976, GURFEIN, J., writing unanimously for the Second Circuit, held:

> "The distinction taken by the Court in *Roth* is that where the appellant's 'good name, reputation, honor, or integrity is at stake' or 'the State, in declining to re-employ (the respondent), imposed on him a stigma or other disability that foreclosed his freedom to take

> advantage of other employment opportunities,' 408 U.S. at 573, he may claim a deprivation of 'liberty' under the due process clause of the fourteenth amendment. A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding".

At the trial in the District Court, the Assistant Corporation Counsel conversant with *Board of Regents* v. *Roth,* 408 U.S. 564; *Perry* v. *Sinderman,* 408 U.S. 593, and *Lombard* v. *The Board of Education, supra,* stated (67a):

> "Mr. Herzog: I will be very brief, your Honor.
> We agree that if there is stigma there must be some relief that the Court can give".

Associate Justice CLARK, United States Supreme Court (Ret.) sitting by designation writing unanimously for the court below held (123a-124a):

> "In light of the rationale behind both Board of Regents v. Roth, supra, and Perry v. Sinderman, supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee. Perhaps the discharge of a police officer is stigmatization per se. But we need not announce such a 'brass collar' rule, for here the record reeks of the stigma that attached to Velger. The stigma foreclosed employment in both the public and private sectors".

The decision by Mr. Justice CLARK was a sound legal exposition by a distinguished Judge who displayed an astute

perception into the principles of law enunciated by this Honorable Court in *Roth* and *Sinderman.* The decision by the Second Circuit below was neither a departure nor a deviation from any of the decisions by this Court.

The Issues

In a disingenuous attempt to becloud the legal and constitutional issues involved, petitioners are asserting that the practical result of the Court of Appeals' decision herein is to require public employers to afford all their employees a hearing on stated charges prior to termination, and that in any event the requirement "of a hearing makes no sense at all" (pet. brief p. 11) in this case because respondent "does not deny that he committed the act for which he was fired", to wit, putting a revolver to his head.

Respondent is not seeking a pronouncement by this Court that all employees in the civil service are entitled to stated charges and a hearing thereon prior to dismissal. This lawsuit was not initiated on that basis. The lawsuit was predicated upon stigmatizing material (53a). The Court of Appeals found that the record reeked of the stigma that attached to respondent and that "the stigma foreclosed employment in both the public and private sectors" (124a).

There is absolutely no justification for the statement in in petitioners' brief (p. 11) that respondent "as much as admits that he put a gun to his head, but urges that this might have been horseplay or the like" referring to 92a, 95a. There was no such testimony. The only reference thereto was in colloquy by counsel.

In the letter of termination from the Assistant Director, Police Personnel, respondent was advised as follows (13a):

> "You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you

as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

Respondent was not served with any charges, was not suspended from duty and was never advised in what manner and in what respect his "capacity was unsatisfactory". In his affidavit respondent stated (43a):

> "9. I was terminated by the Penn-Central Railroad Police Department because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process".

Significantly, the answer made no reference to any incident having occurred relating to a gun while respondent was in the Police Academy. Upon the trial in the District Court before Judge WERKER, petitioners did not offer any evidence relating to the gun incident and made no offer of proof with respect thereto. During the course of the oral argument in the Court of Appeals, the Assistant Corporation Counsel (representing petitioners) was asked by the Court if the Department had stated in the notice of termination (13a) that respondent was being terminated because he put his gun to his head in an apparent suicide attempt instead of stating his capacity was unsatisfactory, would respondent under those circumstances been entitled to a hearing prior to termination? The Assistant Corporation Counsel replied in the affirmative.

The Facts

Prior to January 30, 1970, the New York City Civil Service Commission advertised an open written competitive examination for the position of Patrolmen, Police Trainee, Police Department, City of New York. The Civil service announcement provided as follows (18a):

> "This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.
> Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

Respondent successfully passed the written examination and the medical and physical tests. Before he was placed on the eligible list the Civil Service Commission as required by law investigated respondent's background, school records, employment records, etc., and having found respondent eligible certified his name as qualified for appointment. The Police Department then conducted its own investigation. On January 30, 1970, respondent was appointed from the eligible list to the position of Police Trainee. On August 8, 1972, respondent became twenty-one years of age. On August 15, 1972, respondent was promoted to the position of Patrolman on probation (71a).

On February 16, 1973 with more than three years of continuous service with the Police Department, City of New York, without stated charges and without a hearing, respondent received the following written notice (13a):

> "You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you

as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

An action was then instituted in the United States District Court for the Southern District of New York. In his demand for interrogatories, respondent requested the following information:

"Set forth all the reasons why the Police Department terminated plaintiff on February 16, 1973, inasmuch as plaintiff was continuously employed by the Police Department since January 31, 1970".

In their reply, petitioners stated:

"This interrogatory is objectionable in that plaintiff was employed as a probationary patrolman at the time of his termination and hence has no right to a statement of reasons for his termination". • • •

In response to petitioners' interrogatories, respondent set forth at length all of the government, state, and city civil service examinations which he took and passed. In his affidavit (41a-44a), respondent set forth in detail his inability to obtain employment in government and in the private sector because of his dismissal from the Police Department. In direct examination (72a-76a) respondent testified with respect to his inability to obtain employment. Appended herewith is a letter from the City of Plainfield, Police Department, State of New Jersey, rejecting respondent's candidacy for the position of Police Officer.

The Trial

At the trial in the District Court, petitioners produced a Mr. O'Brien who was employed as the administrative manager with the New York City Police Department "at present assigned to the Personnel Records Division" (98a).

On direct examination, the following testimony was elicited (99a):

"Q. What does the police department do with regard to request for information as to termination?

A. The request for information as to reason for termination is never given out.

Q. To anybody?

A. Other than policy agencies. It has to be a Governmental agency like Park Police, Government Police. If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.

Q. Do they have to have an authorization to obtain that information?

A. Not if it is a Government police agency.

Q. How about if it is a non-Government police agency?

A. The information is not given to them.

Q. Not given to anyone.

A. That's right."

This testimony was extremely significant in view of respondent's testimony that he took over a hundred civil service examinations and passed said examinations "many of them with high marks" (74a).

Although petitioners' witness O'Brien testified that termination records of Police candidates were not made available and were not given to non-Government police agencies his testimony was not true. The fact was that respondent's records and the derogatory matters contained therein were made available to Penn Central Railroad Station a non-Government agency.

Robert J. Steele called as a witness by respondent testified he was the Captain of Police, Commanding Officer at Pennsylvania Station, New York, Penn Central Railroad Station Police (84a) and that respondent was terminated

because of the report submitted by Lt. Lonnie Hamilton (now Captain) of his Staff who inspected and reviewed the Police Department files relating to respondent's termination. The witness further testified that respondent's "personnel evaluation reports were good" (86a).

Lonnie Hamilton employed as a night Captain with the Penn Central Railroad Police testified that respondent filled out a form which authorized the witness to obtain his records at the New York City Police Department. Mr. Hamilton further testified (87a):

> "Q. Now, first with respect to the quality of his work, working for Penn Central, was it satisfactory?
> A. So far as I know it was very good."

On the very crucial issue as to the contents of the New York City Police Department records pertaining to respondent's dismissal, Captain Hamilton testified (88a-90a):

"Q. Did he sign it?
A. Yes, sir.
Q. Then what did you do with it?
A. Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his personnel record.
Q. You looked through the records?
A. Yes, sir.
Q. Tell us what was the reason for the dismissal from the Police Department?
A. From the New York City Police Department?
Q. Yes.
A. It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.
Q. Other patrolmen?
A. Other patrolmen. And supposedly one of the officers reported that Patrolman Velger—

Mr. Herzog: Excuse me. Is this what he said or is this what was in the records?
A. This is what was in the records, sir.

Mr. Herzog: In the records, all right.

A. That patrolman Velger had stuck a service revolver to his head in an apparent attempt to commit suicide.
Q. Did they permit you to make copies of the reports or that was not permitted?
A. I did not make copies of the reports. I took notes from the file.
Q. Then you came back and reported that to your superiors or whoever it was?
A. No, sir. I then tried to verify it.
Q. You did not try to verify it?
A. I tried to verify the information in his service file.
Q. And what happened?
A. I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter, and I gave up.
Q. As a police officer were you satisfied with that report?
A. No, sir.
Q. They wouldn't permit you to investigate or talk to these other policemen that were involved there, the other probationary patrolmen is that correct?
A. No, they wouldn't permit it. I just drew a blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.
Q. Then what happened after that, when you came back to your headquarters?
A. After that? I returned to my boss and advised him of my findings, and I told him that under the cir-

cumstances I would recommend that Patrolman Velger be terminated.

Q. And he was terminated?

A. Yes, sir."

POINT I

The decision by the Court of Appeals below was neither a departure nor a deviation from this Court's rulings in *Roth, Sinderman* and the *Lombard* decisions. *Bishop* v. *Wood,* —— U.S. ——, 96 S. Ct. 2074, accentuates the necessity for an affirmance. Since petitioners at the trial before Judge Werker in the District Court failed and refused to offer any evidence or to make an offer of proof that respondent put his gun to his head in a suicidal attempt while at the academy, a remand would be superfluous. Under the circumstances, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed and respondent reinstated to his position of patrolman, Police Department, City of New York, with back pay, damages and counsel fees.

In *Board of Regents* v. *Roth, supra,* this Court held:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(w)here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential'. Wisconsin v. Constantineau, 400 U.S. 433, 437. Wieman v. Updegraff, 344 U.S. 183, 191; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123; United

> States v. Lovett, 328 U.S. 303, 316-317; Peters v. Hobby, 349 U.S. 331, 352 (concurring opinion). See Cafeteria Workers v. McElroy, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake".

There can be no question but that respondent was defamed. The mere existence of the adverse, derogatory and stigmatic report which was available for inspection and review by prospective employers, government and non-government agencies operated to the immediate prejudice, damage and detriment of respondent and prevented him from earning a livelihood and securing comparable employment. What Government law enforcement agency requiring the incumbent to carry a firearm would hire or appoint respondent under the circumstances disclosed? What Government agency would hire respondent in any responsible position? The accusation that a young man twenty-three years of age had suicidal tendencies was and is a serious charge. It betokens mental aberrancy and is a stigma. Respondent should not be compelled to go through the rest of his life with the stigma of a potential suicide. Everyone had access to respondent's records except respondent. Everyone was made aware of the alleged suicide attempt by respondent except respondent.

In this connection, the Circuit Court held (122a):

> "1. *The Nature of the Charge on which Dismissal was Predicated:*
>
> It stands to reason that any charge that justifies dismissal is a most serious one. Here the exact language of the charge is not known,' but it appears to state that Velger 'while still a trainee . . . had put a revolver to his head in an apparent suicide attempt.' Such a charge suggests to most of us such severe

mental illness that it deprives one of the capacity to do any job well. It thus differs from the usual derogatory charge that is leveled at the capacity to do a specific job. Certainly, no more serious charge could be levelled at a police officer.

Moreover, the 'rookie' officer has the greater hazard because he has none of the job protection guarantees that a seasoned officer enjoys. Ordinarily, he can be severed from the force without any notice of charges or a hearing being afforded him. Police authorities must, therefore, exercise the greatest degree of care in dealing with probationary officers to make certain not only that their discharge decisions are just but also that their reasons are kept confidential. Here New York City admits that it grants ready access to its confidential personnel files to all governmental police agencies. In a case like the present one this could have the effect of closing the public sector to the probationary police dischargee and depriving him of employment in the largest and most desirable segment of his profession. The same result, in reality, is true in the private sector because New York City answers all inquiries for permission to see personnel files with the suggestion that inspection will be permitted with the consent of the dischargee. The dischargee is then placed 'between the devil and the deep blue sea'; he loses whatever his choice. Who would employ an applicant who refused to give authorization? Who would employ one who gives authorization but whose file suggests that he made an 'attempt' at suicide?

2. *The Requirements of Procedural Due Process:*

In light of the rationale behind both *Board of Regents* v. *Roth,* supra, and *Perry* v. *Sinderman,* supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee."

In *Bishop* v. *Wood,* this Court held (96 S.Ct. 2074, 2079):

> "In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity'[12] was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter."

In the case at bar, however, there was disclosure. Every government, non-government and private agency had access to respondent's records. The tenuous defense that petitioners only permitted the inspection of its records if prior authorization had been obtained from respondent is neither persuasive nor sound (123a). In the vernacular, respondent "was damned if he did and damned if he didn't". He had no choice.

In a specious attempt to justify the illegal and obnoxious dismissal of respondent, petitioners grasping at straws have alleged difficulty in terminating an unsuitable officer who is granted tenure citing a 1947 and a 1954 case by the New York State Court of Appeals. That principle of law no longer exists in New York in view of ***Matter of Pell,***

34 N.Y. 2d 222 (1974). In any event, this demagoguery is neither relevant nor apposite. We are not concerned with any disciplinary proceeding. Similarly, petitioners' allegation that New York State Law does not require a hearing for termination of probationary employees (citing *Talamo* v. *Murphy*, 38 N.Y. 2d 637) is not only irrelevant but inaccurate. In that case, the petitioner *Talamo* a probationary Patrolman was dismissed because of a defective condition in his wrist. There was no *stigma* attached. In this connection, the New York State Court of Appeals stated:

> "It should be noted that, contrary to the inference raised in the dissent at the Appellate Division, the reason ascribed for the termination did not stigmatize petitioner or constitute a deprivation of liberty (cf. Russell v. Hodges, 470 F. 2d 212, 217 (2 Cir.))".

The state court recognized that its decision would not apply where the probationer was stigmatized.

Conclusion

The judgment of the United States Court of Appeals should be affirmed and petitioners directed to reinstate respondent to his position of Patrolman, Police Department, City of New York, with back pay, damages and counsel fees.

Dated: New York, September 24, 1976.

Respectfully submitted,

SAM RESNICOFF
and
EDWARD M. RAPPAPORT
Attorneys for Respondent.

JOSEPH FROST
Of Counsel

Letter from the City of Plainfield, New Jersey, Police Department.

(EMBLEM)

CITY OF
PLAINFIELD
NEW JERSEY

POLICE DIVISION

200 East Fourth Street
(201) 753-3039

June 6, 1974

Mr. Elliott H. Velger
1855 Kennedy Boulevard
Jersey City, N.J. 07305

Dear Mr. Velger:

You were recently notified by the New Jersey Civil Service Commission that you were certified for a position with the Plainfield Police Division. This is a formality by which Civil Service purges their list of eligible candidates of those who for various reasons have been rejected by this and other agencies.

The Plainfield Police Division has notified the Civil Service of our rejection of your candidacy for the position of Police Officer with this Division. Our commitment in this matter has not changed. We do however, thank you for your interest in the Plainfield Police Division and wish you success in your future endeavors.

Very truly yours,

THOMAS TRAUTWEIN
Thomas Trautwein
Police Officer
Administrative Bureau

TT/ao